VOL. II. PART SEVENTH AND LAST.

AN

ANALYTICAL DIGEST

OF ALL

THE REPORTED CASES

DECIDED IN THE

SUPREME COURTS OF JUDICATURE IN INDIA,

IN THE

COURTS OF THE HON. EAST-INDIA COMPANY,

AND ON APPEAL FROM INDIA,

BY HER MAJESTY IN COUNCIL.

TOGETHER WITH AN INTRODUCTION,

NOTES, ILLUSTRATIVE AND EXPLANATORY, AND AN APPENDIX.

BY

WILLIAM H. MORLEY,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW,

MEMBER OF THE ROYAL ASIATIC SOCIETY, AND OF THE ASIATIC SOCIETY OF PARIS.

"IF IT BE ASKED HOW THE LAW SHALL BE ASCERTAINED WHEN PARTICULAR CASES ARE NOT COMPREHENDED UNDER ANY OF THE GENERAL RULES, THE ANSWER IS THIS: THAT WHICH WELL-INSTRUCTED BRAHMANS PROFOUND SHALL BE DEEMED INCONTESTABLE LAW."

MENU, B. XII. c. 108.

IN TWO VOLUMES.

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Blackstone's Commentaries, Introd. Sec. 3.

The Seventh and concluding part of Volume the First, containing the Introduction, &c., and completing the Work, will appear shortly.

W. H. M.

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PREFACE.

THE following Appendix to the Digest of Indian Cases comprises Notes of Decisions in the Supreme Courts hitherto in Manuscript, together with miscellaneous matter relating to the Law of India.

The Notes of Cases by the late Sir Edward Hyde East, Bart., which relate to many important points of Native Law, and of the practice of the Supreme Court at Calcutta, are placed in the hands of the Profession with considerable diffidence, as they are evidently hastily and very inaccurately transcribed in the MS. books. I cannot but regret that this portion of the work had not the advantage of the late learned Chief Justice's revision, as he would doubtless have readily corrected any errors, and supplied omissions, that may have escaped my notice. Sir Erskine Perry's valuable Notes were revised in the MS. by the learned Chief Justice himself. I have thought it unnecessary to add to these Notes of Cases the usual Marginal Notes found in our Reports, as the Cases are placed in this Second Volume of my work principally for reference by the Readers of the First, in which the point decided in each case will, it is hoped, be found under the appropriate title; the First Volume, in fact, supplying the place both of Marginal Notes and Index to these portions of the Appendix. A Table of the Names of the Cases, with the principal matter involved in each, has been, however, prefixed, for facilitating reference.

In the Notes of Decided Cases I have retained the spelling of the proper names as it occurs in the MSS. of the

learned authors, as any attempt at correctness would frequently render the name of a Case unrecognizable, except to an Orientalist: moreover, in the MS. of Sir E. H. East's Notes, references are occasionally made in the margin to "Paper Books;" and should these still exist in the Library of the Supreme Court at Calcutta, the retention of the spelling, however erroneous and inconsistent with itself, might be the means of referring more readily to fuller Reports of the Cases.

The Papers on the Police of Bombay, till now unpublished, particularly the Letter and proposed system by Sir James Mackintosh, will be read with interest and advantage by all who are, or may be, concerned in the formation or reformation of the Rules and Regulations of this important branch of the administration of Justice in India.

The reprint of the Charters of Justice may demand some apology, inasmuch as they are to be found elsewhere. This reprint, however, has been undertaken by the advice of several learned persons, for the convenience of comparison between the three Charters: in addition to this, the Charter of the Supreme Court at Madras is not readily to be met with; and the rarity of that of Bombay will, I doubt not, render its re-appearance acceptable to the Profession.

I here beg to offer my most cordial thanks to Sir James East, Bart., M.P., who kindly placed at my disposal the Notes of the late learned Chief Justice of Bengal, the Right Honourable Sir Edward Hyde East, Bart.; and to the Honourable Chief Justice of Bombay, Sir Erskine Perry, who communicated to me his valuable Notes, and the interesting MSS. on Bombay Police.

The Analysis of the Acts of Government, announced in the Specimen of my Digest as to form a portion of the Appendix, has been rendered unnecessary by the publication of a volume by Mr. Theobald, entitled "The Acts of the Legislative Council of India;" which contains, besides the Acts themselves, an Analytical Abstract prefixed to each

Act, and copious Indices.[1] The thanks of the Profession are due to Mr. Theobald for the care and perspicuity displayed in his work.

Words in the native languages occurring in the Appendix will be found explained in the Glossary at the end of Volume the First.

W. H. MORLEY.

15, Serle Street, Lincoln's Inn,
17th *May* 1849

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[1] This Volume appeared in the year 1844, and Mr. Theobald in his Preface announced his intention of continuing the Work.

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APPENDIX.

VOL. II.] [PART I.

AN

ANALYTICAL DIGEST

OF ALL

THE REPORTED CASES

DECIDED IN THE

SUPREME COURTS OF JUDICATURE IN INDIA,

IN THE

COURTS OF THE HON. EAST-INDIA COMPANY,

AND ON APPEAL FROM INDIA,

BY HER MAJESTY IN COUNCIL.

TOGETHER WITH AN INTRODUCTION,

NOTES, ILLUSTRATIVE AND EXPLANATORY, AND AN APPENDIX.

BY

WILLIAM H. MORLEY,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW,

MEMBER OF THE ROYAL ASIATIC SOCIETY, AND OF THE ASIATIC SOCIETY OF PARIS.

"IF IT BE ASKED HOW THE LAW SHALL BE ASCERTAINED WHEN PARTICULAR CASES ARE NOT COMPRISED UNDER ANY OF THE GENERAL RULES, THE ANSWER IS THIS: THAT WHICH WELL-INSTRUCTED BRAHMANS PROFOUND SHALL BE HELD INCONTESTABLE LAW."

MENU, B. xii. v. 108.

IN TWO VOLUMES.

VOL. II.

CONTAINING THE APPENDIX.

LONDON:

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THACKER, STELL AND LEPAGE, CALCUTTA.

MDCCCXLVII.

[Entered at Stationers' Hall.]

"THE DOCTRINE OF THE LAW THEN IS THIS: THAT PRECEDENTS AND RULES MUST BE FOLLOWED, UNLESS FLATLY ABSURD AND UNJUST; FOR THOUGH THEIR REASON BE NOT OBVIOUS AT FIRST VIEW, YET TO OWE SUCH A DEFERENCE TO FORMER TIMES IS WISE, TO SUPPOSE THAT THEY ACTED WHOLLY WITHOUT CONSIDERATION, UPON THE WHOLE, WE MAY TAKE IT AS A GENERAL RULE. FROM THE DECISIONS OF THE COURTS OF JUSTICE ARE THE EVIDENCES OF WHAT IS FOUNDER LAW: IN THE SAME MANNER AS, IN THE CIVIL LAW, WHAT HAD BEEN DECREED MINISTRY WAS TRANSFERRED AS A GUIDE FOR THE FUTURE."

Blackstone's Commentaries, Book I, Ch. 3.

NOTES OF CASES

NOTICE.

The following Notes of Cases by Sir E. H. East, which contain many important points of Native Law, and of the practice of the Supreme Court, are placed in the hands of the Profession with considerable diffidence by the Editor, as they are evidently hastily and very inaccurately transcribed in the MS. books. He regrets that this portion of his work had not the advantage of the late learned Chief Justice's revision, as the latter would doubtless have readily corrected any errors, and supplied omissions, which may have escaped the Editor's notice. The orthography of the proper names, as occurring in the MS. of the learned Chief Justice, is retained, however erroneous and inconsistent with itself, since references are occasionally made in the margin of the MS. to "Paper Books;" and if these still exist in Calcutta, it may be the means of discovering and referring more readily to fuller Reports of the Cases.

Inasmuch as the Notes of Decided Cases which form part of the Second Volume are mentioned and referred to in the Digest, the Editor has thought it necessary to publish them concurrently with the First Volume.

ERRATA

Page 39, line 15, *for* 247 *read* 58.
Page 41, line 28, *for* Dough. *read* Dougl.
Page 73, last line but one, insert "*durante minoritate*," between the words "administration" and "of."
Page 95, line 17, *for* 2 Wils. *read* 2 Wils. 6.
Page 96, line 15, *for* 258 *read* 298.

NOTES OF CASES

DECIDED IN THE

SUPREME COURT OF JUDICATURE,

AT FORT WILLIAM, IN BENGAL,

BY THE LATE

RIGHT HON. SIR EDWARD HYDE EAST, BART.,

CHIEF JUSTICE OF THE COURT.[1]

No. I.

ANONYMOUS.

19th November 1813.

QUESTION was made, whether a wife who had been appointed by her husband, before his death, guardian and mistress *(Málik)* of their infant child's property, is entitled by the Muhammadan law, in case of injury or disseisin done to that property, to sue in her own name only, in an action brought for recompense or recovery, as if she were, in fact, beneficially interested as proprietor; or whether she ought not to have mentioned the child. And it was answered by the *Maulaví* that she ought to have brought the action, either in the child's name alone, or coupled with her own as guardian.

It was also determined in the same case, by the *Maulaví*, that where there is but one child of a marriage, or any larger number, the widow is still entitled only to one-eighth of her husband's property at his death. There was another question made by the Court, whether, according to custom, and by the law of India, purchases of estates are not often made under other names than those of the real purchasers: to which the *Maulaví* answered, that it is customary for the name of the actual purchaser not to appear at all in the deeds, nor is there any document

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[1] By the kind permission of Sir JAMES EAST, Bart., M.P, these notes of Cases are now first edited from the unpublished MS. of the late learned Judge.

between the nominal and real purchaser as to the trûsts or purposes of the purchase; but possession both of the property and deeds is delivered to the beneficial proprietor, and these are his title.

No. II.

ANONYMOUS.

16th December 1813.

In an indictment of assault laid to have been committed on and by British subjects, on board a ship belonging to British subjects of our Lord the King,

Fergusson contended, that upon an indictment it was necessary to prove the whole charge as laid; and that the indictment having undertaken, therefore, to prove the ship's ownership, and the evidence being that the ownership actually belonged to Armenians residing out of the jurisdiction of this Court, it was bad for want of proof, as well as for want of jurisdiction. And upon the latter point he said that the proof was most material, and the allegation most substantial; because, without it, the Court could not support their claim to jurisdiction: for what jurisdiction had they in the case where one British subject, suppose the commander of a neutral or enemy's ship, should assault another British subject in the same ship? and this was exactly the case.

But the Court held, that the jurisdiction of the Court was amply maintained in the persons of the two parties in this case, and that the statement as to the ship's ownership was mere surplusage, and might be rejected.

The Court also seemed to be of opinion that all foreigners born, and residents of every description, except prisoners of war, within the King's territories in Asia, are as much King's subjects as the same description of persons would be in England.

Fergusson, in replying, said that they had never been so held in the Supreme Court.

No. III.

ANONYMOUS.

13th January 1813.

In a plea in abatement in equity, it was objected, that where letters testamentary had been granted out of the Supreme Court for the admi-

nistration of property, the defendant had no power to seize upon lands at Dacca, in contribution towards a fund for payment of the testator's legacies and debts, which lands were without the jurisdiction of the Court, being subject to the Mofussil law; and therefore that the executors could not be called upon to charge those lands under their letters.

But this plea was overruled with costs, because the defendant was estopped from denying the jurisdiction of the Supreme Court, out of which he had obtained his authority for administration of the testator's effects, notwithstanding that the testator was not himself personally subject to the King's Court, being an Armenian resident at Dacca continually, and notwithstanding that his lands were out of the jurisdiction, so long as it appeared that the Court had been actually called upon to interfere by the defendant himself, and that there appeared also to be some property within the town of Calcutta, on which such authority in the Court might operate. But the defendant was allowed to plead *de novo*, and the plaintiff to have liberty to amend his bill also.

No. IV.

MULLICK.

versus

MULLICK.

January 1814.

Strettell moved the Court to allow the costs of an issue which had been directed by the Court to be tried from the equity side of the Court, and on which issue his client, the defendant in that cause and issue, had obtained a verdict.

The original bill had been filed by six brothers (against two, who were managers of the testator's property) for an account, and to be let into a participation of that property, as a part of which they laid claim to certain notes in the possession of one of the defendants. In the Master's office, where the matter was referred, this defendant claimed these notes as his property, offering evidence to shew that the testator had indorsed them specially to him some months before his death. The indorsement in the testator's hand, together with the acceptance of them, and payment at the bank, were proved; but the Master did not think this enough proof of property in the defendant, and the defendant

then shewed a most complicated book of account between himself and the testator, in which he endeavoured also to shew that he had given a valuable consideration for them. But the Master still thought that these books were too mysterious and complicated to be understood either one way or the other; and not thinking that the indorsement alone was good evidence of property, decreed them to be part of the general fund, and liable, therefore, to be, with the other property, divided amongst the eight brothers equally. In exceptions to the Master's report this question came before the Court, viz. whether the defendant, having proved the indorsement, had not substantiated the property of the notes to be in him; and that it lay then on the other side, either to controvert the fact, or shew some fraud in obtaining the indorsement; neither of which they had done, or offered.

Royds, J., and Burroughs, J., were the only Judges in the Court; and, differing entirely on the point, Royds, J., who had the casting voice, was prepared to have decided in favour of the complainants that this proof was insufficient, and to have confirmed the Master's report; but in deference to the very decided opinion of Burroughs, J., the other way, he directed an issue to try at law the question of property in these notes. At the trial, when the bench was full, after a trial of sixteen days, during which time no new evidence was produced to throw any other lights on the subject, the whole Court were unanimous that the plaintiffs had made out no title to any share in these notes, which it was incumbent on them to shew, the defendant resting, as he did in the first instance, upon his indorsement, and gave a verdict accordingly. For which verdict the defendants now claim the costs of the issue.

Lewin, for the complainants, contending that the assignment of costs was entirely in the discretion of a Court of Chancery, thought there was nothing in this case to induce them to throw all the burthen on one side, when the issue had, in fact, been directed, not at the instance of the complainants, but purely to satisfy the conscience of the Court.

Strettell, in answer, alleged that he was entitled to the whole costs in this issue, on the ground that this was nothing more than the common case of a trial, where the plaintiff had failed to establish a

right to the property of another; that it was simply a question of *meum* and *tuum*, in which, *primâ facie*, till the contrary be proved, the possessor had the better title, and whom the verdict had now determined to have had the only real and actual right of property as well; that it was very hard, that when the real, *bonâ fide*, and conscious owner [for all this must be taken for granted since the finding] had been unjustly attacked in his property, and because he defended it in the confidence of an assumed owner, he should be made to pay for resisting such an attack. That as to the direction of the Court, in which he certainly, the defendant, took no part, it was always the form of issues directed out of Chancery, viz. to satisfy their consciences; but that in fact it was the interest of the party who sought redress, and not of a mere defendant, to have a suit agitated in any Court; and that this was a simple trial at law, in which one party sought to recover another's property, to which he had no right; and that the costs would have gone with the verdict without question at law upon this issue, if it had been tried without the intervention of a Court of Chancery. But in these issues he took a distinction where they are directed to ascertain a doubtful title, between parties standing *primâ facie* in the same degree and right of claim, as upon the construction of a will in which each supposes himself to be the party intended, and where each are therefore in the nature of plaintiffs; and one, having possessed himself of the property before the other, does not prove that he was actually the devisee meant, but his whole right rests upon men's understanding of words, and each side perhaps has colour; but that here was no such equality in the situation of two adverse parties, where one asserts, maintains, and proves eventually, that such a thing is his, which the other had in vain attempted to wrest from him. He admitted that Courts of Chancery had discretion in awarding costs, but thought that discretion was as much bound by precedent as positive rule. But the Court determined otherwise. (BURROUGHS, J., *dissent.*)

EAST, C. J., thought that the defendant was not more entitled than the other party to the costs of an issue which had been ordered by the Court to satisfy their conscience. Whether the question had been rightly ordered into a Court of Law was not now material. He was well convinced that it had not been so, as it lay on the complainants,

when the indorsement had been proved, and such title made out accordingly as should have satisfied both the Master and Court on the side of the indorsee, to have shewn at least some fraud or other matter that might have thrown doubt upon the possession. He said that as the elder Judge on that occasion was prepared to have given judgment against the defendant, if the question had been in the first instance to be determined, that the defendant in fact, though in the suit in character of defendant, had actually been the party benefitted by the issue directed to try the right to his property; and that, on the other hand, the nominal plaintiff, the complainant, was not at all interested in prolonging the cause; and therefore, that as neither party in fact had solicited the issue, but that it had been ordered to satisfy the doubts of the Bench, not nominally and formally only, but because the difficulty really lay there, it would be hard on either party, the particulars known, to make them pay the costs of both sides; and that this was exactly the case of all appeals or new trials ordered on a Judge's mistaking law, where each party pays his own costs.

BURROUGHS, J., agreeing, the co-defendant was first included in this decree; but, on consideration, thinking that it would be particularly hard on him [who had, in the first instance, admitted the defendant's right to the notes, and was not, therefore, on either side, but neutral, and so continued, and was not joined even in the issue] to pay one half of the costs of a suit collateral in which he was not engaged, the Court ordered the costs to be paid out of the general fund, so that each of the eight brothers would contribute equally.

N.B. By this means, the eighth brother was implicated, though not so largely, in the costs of a strange trial.

No. V.

ANONYMOUS.

January 1814.

MORTGAGE of land and judgment bond given at the same time as security for a debt.

By the Charter, the Sheriff is empowered to sell lands, goods, and chattels, for payment of debts, &c. The plaintiff had sued out execu-

tion on his judgment, and, amongst other things, against the lands under mortgage to himself: and on the defendant's part,

Fergusson now moved for an injunction to the Sheriff, on the ground that the plaintiff, having accepted a mortgage of the land, he had bound himself down, by his own deed, to a remedy upon that mortgage, which could only be had by bill of foreclosure, and that to resort to his judgment against that very land was to deny his own deed; because, in every mortgage, the law implies a resulting right to the lands in the mortgagor after the debt satisfied: and he would now put an end to that title, by taking at once the whole estate in the property which he had confessed to be in him and another. He contended that he had chosen his own course against this particular property, though the judgment might certainly avail him for other purposes, and that course was the common bill of foreclosure. By any other event he would deprive the defendant of what he had allowed him to be in the first instance possessed of, his equity to redeem the premises; and, secondly, the mortgage deed itself, after forfeiture, purports the property of the land to be in the mortgagee; and as there is nothing but an equitable right in the mortgagor to redeem it, it would, in effect, be an execution against an equity of redemption; which species of property is not included under any of the words of the clause in the Charter, as a subject for an execution by the Sheriff, nor could he levy it.

Strettell endeavoured to shew that the equity of redemption was in fact the *land*, and is so called in the books; and that a mortgage is but a security for money, and no actual real property; so that, notwithstanding the deed, the land might still be said to be the mortgagor's, and therefore liable to the plaintiff's execution at all times; and still more if, and whenever, he chose to renounce the security of the mortgage, and resort to other means of satisfaction for his debt; and that the judgment-bond was taken by the parties at the time as a *collateral* security for the same dues.

But the Court *contra* decreed that the land under mortgage is the mortgagee's already, and not the mortgagor's; as the mortgagee, if he choose to take possession, may maintain ejectment for it in his own name, even against the mortgagor; and an execution by such person is, in effect, an execution against an equity, because

he had already all the realty in him, and he is bound by his own acknowledgment.

No. VI.

ANONYMOUS.

28th January 1814.

Fergusson moved for a commission to be directed to a certain person at Canton, in China, to examine witnesses in a cause where an adverse title was set up to that under which the tenant originally held.

The Court objected, that the purpose for which such testimony was sought was against good faith and conscience, and contrary to law; and such defect appearing upon the face of the bill itself, it was useless to direct an examination of witnesses under such circumstances.

Fergusson contended, that it was enough for him to have shewn, for the purpose of obtaining this collateral object, so much by his bill as to prove these witnesses material on the point on which he desired their testimony; and that this was no argument on demurrer, where the legal object of litigation was in question; that he called for this testimony merely as a part of his cause, and to prove simple collateral facts, for which they were good and substantial witnesses; that as for the rest he might and had the liberty to prove by other means the general merits of his case, and that this was not the opportunity for that discussion. He put the case of papers, which were necessary for the sustaining a suit in another Court, where it was held enough to shew that they were material to that cause, and in the defendant's possession.

But the Court overruled the application, saying that the case last put was exactly that in point, and against him; because, if it appeared evident to the Court that the papers applied for in discovery were for an illicit and unfair purpose, the discovery would be denied. Now here the object of the suit for which the aid of this evidence was required was just of this nature, it appearing on the face of the application that the tenant meant to set up an adverse title to that under which he was holding, from doing which he was estopped by his own act of acceptance of the lease from his acknowledged landlord; that

whenever a tenant means to dispute the title of one with whom he had contracted to hold, he must shew eviction of himself under the original lease, or that he now holds under some new and better title subsequent to and not paramount to the title of his lessor.

Lewin, contra, for the defendant.

N.B. This question came on on motion for a commission of examination, and also for an injunction against the defendant, who was proceeding against the applicant in an action of debt for rent, or for use and occupation of a factory at Canton which one British subject had leased to another there.

Fergusson had leave, therefore, to amend his bill of injunction; and on shewing thereby, that, by the laws of China, a foreigner can only be possessed of property in that country during his residence there, that the lessor had ceased to reside there, and that his title, therefore, had since, and subsequently to the defendant's holding of him, determined, and that he now, therefore, by law, and also in fact, held these premises under another title, a rule was granted on paying the costs of this application.

No. VII.
ANONYMOUS.

28th January 1814.

Mr. C. Reid appeared in Court, *in propriâ persona,* counsel having refused to conduct his business, and made a motion to have his affidavits filed on the rolls of the Court for the purpose of instituting a criminal proceeding against certain persons by name, (the Judges of the Court of Sudder Dewanny Adawlut,) for misconduct and misdemeanour, which he was about to state to the Court, having sworn his affidavits now, East, C. J., not wishing to have them sworn before himself singly, as concerning a great public trust, and being ready to enter into a recognizance for the following his suit, when

Mr. Advocate General read to the Court a clause from the 21st Geo. III. c. 70. s. 25., by which any one intending to prosecute a magistrate for neglect or malfeazance of his office is required to give a month's notice to such magistrate previous to the instituting such proceeding.

The applicant was accordingly ordered to conform to the rule.

No. VIII.

ANONYMOUS.

31st January 1814.

A B by his will directed, amongst other things, one-half of his personal property to be laid out after his death, by executors therein named, in pious uses; such as the saying of masses for his soul both at Bombay, Goa, and in Bengal, and also for distribution amongst the poor. This will having been brought into Court, and thence referred to the Master, he had sketched out a plan for such distribution of the testator's legacy; amongst many objects of private and public charity, two-thirds for the benefit of Bengálí objects, and the other third for the poor of Bombay and Goa; and now the executors came into Court for further directions.

East, C. J., objected to the mode of proceeding which had been had; considering, that as the testator had given entire trust to his executors' discretion, and had not pointed out any particular charities in which this fund was to be expended, and particularly as it was made a perpetual trust of money arising from estates to be annually laid out in these charities, the case therefore differed from those in which, notwithstanding such discretion in trustees, the Courts of Equity had interfered, and disposed of and decreed one already existing and determined fund for such purposes as seemed to come nearest the testator's intention, without considering the trustees as entitled to dispose of it as seemed to them fit. Yet, that where the fund appropriated to these purposes was an annual accruing property, there was no case which could authorise the Court in divesting the trustees, who were here the executors, of that power with which the testator had thought fit to clothe them; and that, besides the impropriety of such a stretch of jurisdiction, there would hereafter be great inconvenience in having saddled the Court with the perpetual duty of looking out for and distributing amongst so large a class of claimants as the poor in general of a large part of India; and that as, for such a duty, it was absolutely necessary that one or two individuals should be continually employed in the due appropriation of so large a fund, that however grateful it might be to the Master to be the minister of charity immediately about him, yet that, besides the inconvenience of making him look after distant

objects of charity, as he might be otherwise employed, there was no reason, when it came of necessity to be a private and personal concern, that the executors, whom the testator had pointed out, should be either relieved from the burthen, or debarred the pleasure of this undertaking. And therefore he suggested, and the other Judges accorded, that the executors should have the whole scheme and control of this charitable fund, subject of course to the supervision of the Court, who would see that it was properly appropriated, and that the trustees construed the intention of the testator as the law would allow.

Upon that part relating to pious uses, the *Advocate General* attempted to argue, that the whole purpose of the testator might be carried into effect notwithstanding the statute; for that there was nothing therein said as to masses, which, therefore, he contended were not superstitious uses within the statute.

But the Court held otherwise, saying that these were included under the general description of superstitious uses, being such as our Church abhors and disallows. That part of the will, therefore, was decreed to be set aside as contrary to law, and the whole fund to be appropriated to charities, under which a Roman-Catholic brotherhood in Calcutta prayed to be admitted, and that some part might be laid out in repairing their church and convent, which they represented to be in a state of great decay. *Sed non allocatur,* because evidently not within the testator's grant.

No. IX.

ANONYMOUS.

February 1814.

A BILL for account, receiver, and partition having been filed by the younger sons of a testator against the elder, who were managers, together with two other persons.

Fergusson, in support of the answer to such bill, argued that the granting of an account is not a matter of right to the petitioners, but is so far in the discretion of the Court, that if they saw manifest inconvenience and injustice to either party in so doing the bill would be refused. The bill is for an account, receiver, and partition, brought by the complainants, one a younger son of the testator, and the widow,

who appears as next friend of an infant, the other younger son, against their two elder brothers, who were left and directed by the testator, together with two other persons who had long been connected with testator and the management of this property, to take care of it. The defendants admit in their answer that they are in possession of the profits of the real estate as well as of the personal, and that they have never rendered any formal account of either, but that they have regularly kept such accounts, and that there had been ready access to the complainants to investigate and consult them, and see if they were true, and that the complainants had never sought any inquiry. The funds had all been treated as joint and common property, and had been applied according to the testator's intention, both the real as well as personal, towards the conduct of a commercial pursuit. They declare, also, that they have not hazarded or deteriorated the property, but the contrary, and they admit jurisdiction. The testator in his will directs thus: "Allot a portion of ten parts to my two eldest sons, and six to my two younger sons, the eldest to be the master of the whole;" and he directs it, as is usual, to his "two attornies," as they are called, which has always been taken to mean executors. There is then a legacy for pious uses; and next, "partition may be made when the youngest son becomes of age, according to the allotment specified; before which, whatever either of the parties require from the general fund will be debited to them, and this you will deduct from their shares. My two eldest sons are masters of the whole."

Burroughs, J.—In equity, will not the *cestui que trusts* be considered the real owners under this will, even allowing the word "attornies" to be construed trustees? and have they not full power to act?

Fergusson proceeded to argue, that whatever description these additional persons came under, neither they nor the sons were to be wantonly called upon to part with their accounts, particularly to bring them down from so great a distance into the Master's office, where, without imputation on individuals, great delay was incurred, and would, in this instance, entirely defeat both the testator's intention and the real interest of the parties, inasmuch as it was impossible to carry on commercial concerns without the records and muniments and every-day account book, the whole of

which must be for a long while withdrawn to answer the purposes of the bill. He argued that there was no imputation even in the bill of either fraud or default in the managers, on one of which at least such a bill should always be founded. He contended that the attornies to whom the will was addressed were to be considered in the light of trustees of the whole estate; that it was in them that the testator had confided; and they were the most fit for such a trust, as they had been in the constant employment of the testator for the management of his concerns: they were his testamentary guardians of his family, as well as trustees of his estates; they had the whole management and control, and the devise to sons was therefore no immediate gift to them; but there was a certain period assigned by the testator when their interest was to commence, when the functions of the trustees were to determine, viz. when the youngest son should come of age. He argued. that by the term "my two eldest sons are masters of the whole" the testator meant, not that they were to supersede the authority which was vested in the attornies, nor that they were to be the managers of the estates, because then he would have used the word *Málik*, but *Mukhtár* was his expression, signifying "masters;" *i.e.* they have the largest interest in my property, and are therefore principally to be considered; with them you are to consult; they are the first objects of my consideration: the accompanying directions, such as, "you will continue them," "you will transact business with them, and carry on the concerns in the same way in which they are now going on," together with their instructions as to the debiting each son meanwhile; and, *in fine*, adjusting finally the partition of the testator's property amongst the several objects of his bounty, all shewed that they, the attornies, were to be the actual managers of all. But looking on the sons, as they undoubtedly were, to be the principally interested persons, and treating this devise as a direct grant even to them, he contended that there was nothing illegal in the qualification with which it was incumbered, because the testator had the entire, or only part disposal of his own property, and such grant was not subject to the inconvenience that affects perpetuities, and has made them to be considered as void on public grounds: that a man by our own law may give an estate to be enjoyed at a certain time, and not to take effect before such time, is the common case of all executory

devises, as contra-distinguished from contingent remainders, where there must be a pre-existing estate vested on which such contingency may rest. Now this, he argued, was exactly the case here, for it was evident the estate was not to be fully enjoyed till the youngest son's becoming of age; and, at all events, he conceived, that by the Hindú law a father might say this property shall remain an undivided estate till then, and he wished this question to be put to the Pandits.

BURROUGHS, J.—There is no use in putting such question, as their law on this point must be entirely adopted from ourselves, there being no code of law of wills, according to Mr. Colebrooke's book. But I have a case exactly in point, determined in this Court on the 14th October 1808, upon the will of *Mudder Bone Bysac*, where the eldest son also was not to be entitled to his share till the younger came of age. As the minor in that case died during his minority, eventually, in fact, the estate was enjoyed before the period limited by the will, but the purpose of the testator had ceased to operate on the minor's death. The words there were, "the property shall be in charge till," which is the same here. Now, as the Hindú law is the same with respect both to lands and personalty, the same objection holds both with respect to the partition of the lands and present participation in the profits of the commercial property; because in admitting the complainants to a division of either, the testator's intention would be defeated, viz. that both might for the present be made contributable to his general purpose, viz. that of the whole estate, both real and personal, increasing till it was valuable enough to be divided with advantage to all parties.

EAST, C. J.—In case of the partition taking place, and that the elder brothers were so far therefore removed from the management of that part of the property, viz. the infant's share, there might certainly ensue some detriment to the minor, because his share, then standing alone, would have a much worse chance of being attended to, and would be removed from participation in the profits of trade which are now applicable, and to be applied to the improvement of the common property by the brothers who are of the age of discretion. We must take care that his interests are not affected.

Fergusson.—And yet the complainants do not seek to have these four trustees removed, nor was it at all within the contemplation of the

testator, who says, "You will debit him who takes money, and give him what is proper; and should they not agree when the younger is of age, you shall divide the estate." Where the testator's intention is so clear, a Court of Justice is not authorised to adopt a system of its own, and put an earlier period to the management than was originally contemplated, unless where there is palpable fraud or misconduct on the part of those who are empowered by the testator himself to carry the purposes of his will into effect, which is not even suggested here. As for the account prayed for, that is to be resisted on the ground of the very great inconvenience which would attend the execution of it; for it would actually put an end to the great benefit which the estate is now receiving from a very extensive and profitable trade, carried on as directed: it would oblige the trustees to bring into the Master's Office all the ledgers and other papers on which the whole business hangs, and which are the common machinery of every commercial concern, and which cannot be interrupted and disarranged without essential injury to all parties.

Burroughs, J.—Account is a matter of right which every one interested is entitled to against trustees, whether there be fault or misconduct shewn in them or not.

Fergusson.—Not where the Court sees that not only injustice will be done by the grant to one party, and injury to the interests of both. But, at all events, partition would be subject to the inconvenience before mentioned, that whatsoever portion was cut out and deducted for the minor would be in fact in a much more unprotected state than before.

Strettell in reply.—Account is a plain matter of right, which any partner, admitting for argument that these parties are partners in trade, has a right at any time to call for from his co-partners without shewing any sort of fault in them, but because he prefers a public to a private trustee. And it seems that partition is as much a matter of right, which is often exercised even by infants. Here the two properties, real and personal, seem to be much interwoven; for the landed estate has in fact been improved and increased from the commercial fund, which was made subservient in the testator's life to this purpose, and has been so since. But this is no reason why they are to be still bound to each

other against the properties of both. Real and personal estate are no more considered the same in Bengal than in England; and I would contend that landed property is not to be considered there as part of the stock in trade, subject to all the variations and hazards of more naturally fluctuating property. It is subject to debts, no doubt, but is never involved in the actual circumstances of trade. There is nothing, therefore, in the quality of land which belongs to commercial engagements; and as this land has not been limited to such purposes conditionally, but is already and finally disposed of by the testator, even if the purpose were so express, it is against the policy of the law to cripple the enjoyment of it with those conditions. There is, however, only a direction to these (as they ought to be considered) testamentary guardians, which cannot be held to take away the right which every tenant in common has to a writ of partition.

The Court adjudged an account previous to any other determination.

N.B.—*Strettell* quoted 2 Schoales and Lefroy, 26; Ambler, 273; 1 Brown's Ch. cases, 105; 3 do. 265.

No. X.

ANONYMOUS.

24th March 1814.

THIS was an action of Ejectment, brought by the two daughters and co-heirs of *A B*, a deceased proprietor of the property in question, to recover the premises as set out in a bill of particulars as having belonged to their father. He was seized only of a moiety of the property, as was proved at the trial; but this was allowed to be no bar to their recovering what was really the amount of his estates, notwithstanding the declaration was for the whole.

Strettell, for the lessors of the plaintiff, proved their capacity clearly of taking as nearest of blood, and heirs. *A B*, the deceased father, had also another, a third daughter, living at his death, but she was not joined in this action with her two sisters, because, according to Hindú law, she had ceased, by marrying, to have any title to her father's property, being, as it were, adopted into another family, viz. her husband's, and therefore regarded as being provided for. He then stated that the eldest lessor of the plaintiff had a son born before *A B*'s death, who was

living, and that the youngest daughter had married and had two sons since *A B*'s death. *A B* also left a widow.

To complete the plaintiff's case a question was asked the Pandits.

Quære, A man dies leaving landed property, a widow, and three daughters, but no male issue; one of those daughters has a son born during her father's lifetime; *Quære*, Who is entitled to possession at the father's death?

A. The widow is entitled to an estate for life, and after her death the unmarried daughters have equal shares: the daughter that is married in her father's *lifetime* is not entitled to any. If one daughter had been married, and the other not, at the father's death, no intervention of the widow's estate having occurred, the unmarried daughter would have succeeded solely.[1]

Fergusson, for the defendant, stated that his client claimed, as the adopted son and heir of the deceased *A B*, and it was proved that he had been so adopted by the widow of *A B* after his death, according to instructions given to her for this purpose by him during his lifetime. The ceremonies were all very distinctly proved to have taken place, at some of which the lessors of the plaintiff themselves were present, officiating particularly in the *Pata chase*, which it is peculiarly the duty of brothers and sisters, as the name imports, to perform towards one another, by putting the spot of paint on the other's forehead, whereby they acknowledged the plaintiff to be their brother. He proved that there was an understanding in the family twenty-two years before the adoption took place; and several witnesses swore to having heard *A B* invest his wife with a power to appoint him an adopted son after his death, he himself having in his lifetime made many attempts to procure one, and having failed. It is besides most natural for a Hindú to wish to have some one, who must be male, to perform certain ceremonies by which he believes his soul will be redeemed from *pat*, *i. e.* purgatory: females, daughters, &c., cannot do him this service. Adoption may be performed by parol, and is equally binding in law, and a power of adoption may also be made over.

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[1] This was not of course the point in this case, but was mentioned as law by the Pandits, though this rule is not mentioned in the books: the widow is now dead.

The following questions were here put to the Pandits:—

1st, Whether any written authority was necessary to be given by the husband, to entitle his widow to adopt?

A. No.

2dly, Are any ceremonies usual on such occasions of deputing?

A. No, it may be merely verbal; but if there were no other witness of the widow's having received such a power from her husband but the widow herself, she would not be believed, and could not prove it.

3dly, Whether, if there be living a son of the deceased's daughter at the time of his death, any other can be adopted?

A. Yes, any stranger even, without restriction.

Thus the power of the widow to adopt, as she had done, a stranger after her husband's death, by virtue of a general power, being established, and the fact of adoption being proved, there remained only a few questions more of Hindú law to put the lessors of plaintiff out of Court.

Here the following question was asked of the Pandits:—

May such a power of adoption, delegated to the widow, be exercised at any time after her husband's death?

A. Yes, so it be in the widow's lifetime.

This adoption had been made fifteen years after her husband's death, so that the widow enjoyed the property solely for some time; but since the defendant had come to the age of sixteen she had given it up entirely to his management and benefit, which was a strong corroboration of the truth of the defendant's case, because the widow herself had actually, by the adoption, deprived herself of a life estate, which she would otherwise have had in the whole premises, instead of her eighth only. There had not been any quarrel with the daughters.

It was also inquired of the Pandits whether a widow could adopt a child which was not in existence in her husband's lifetime?

A. Yes.

Although the end of redeeming the husband's soul from *pat* seemed to have been very little answered by adopting a mere infant that did not come of age to perform the ceremonies for fifteen years afterwards. In the case of the Rajah of Tanjore, quoted by *Fergusson*, there was also a parol adoptive power, and this was authenticated

and clearly established as law by all the Pandits of any distinction in India.

The facts of the case and the law being clearly established, the Court gave judgment for the defendant.

No. XI.

ANONYMOUS.

January 1815.

THE Court held, that where, by the 87th Rule on the plea side[1], the plaintiff is required after judgment to charge in execution a defendant in custody, within ten days next after the time allowed by the Rules, and that where no provision is in fact made by the Rules for the case, and no time specified, that the time must be taken to be that allowed by the Rules of the K. B., which is two terms. And therefore they rejected an application made by a defendant in custody, after judgment confessed, to be discharged on filing common bail, upon the grounds of the ten days having elapsed after such judgment, though twenty-nine days had in fact elapsed, and the regular two days' notice had been given to the plaintiff that such application would be made to the Court in default of his being sooner charged, and no steps still had been taken by the plaintiff so as to charge since the service of the notice.

East attempted to take a distinction between the cases of judgments confessed and adverse judgments, on the grounds that the time allowed for charging in execution after judgment was a mere favour to the defendant, and that by voluntary *cognovit* he had merely abandoned his claim to that favour. *Sed non allocatur.*

No. XII.

KISSOREE DOSSEE

versus

MULLICK.

January 1815.

WHERE the defendant had acted in the capacity of *Mukhtár*, or steward, to the complainant for the space of seventeen years, and was

[1] See 2 Sm. & Ry. 87. par. 3.

at length discharged from such service, the complainant having given him a general release as to all matters in account between them, &c., and she afterwards brought her bill in equity against him for an account, it was held, that she was well barred from so doing by the release she had given, though it was charged in the defendant's answer, and proved in evidence upon interrogatories, that the complainant had been made acquainted with the actual state of accounts, and that a balance had been found, as the defendant admitted, against him upon such account taken.

The account was accordingly refused.

On motion for rehearing shortly afterwards, it was mainly insisted on by *Fergusson*, that the defendant, having relied in his answer upon the fact of an account having been actually had between the parties previously to the execution by the complainant of the general release, and that the complainant, therefore, was well acquainted with the amount of what she was releasing; and that this accounting having been positively denied, in answer to interrogatories to this effect by the witnesses, who were charged to have been present when the account and balance were taken; that the very grounds insisted on by the defendant for the executing such a release on the part of the complainant had been disproved and falsified; and that this was enough to colour the whole proceeding with fraud, and must vacate the release. And for this purpose he quoted *Anon.*, Skinner, 148, "Release set aside, because granted on a representation of the party, defendant, that his accounts were correct, whereas afterwards, on inspection, they appeared to have been incorrect;" and also *Huguenin* v. *Baseley*, 14 Vesey, where it is held, "that where a man alleges grounds of release in which he fails, that release will not hold good." And as to the effect of general releases obtained by fraud, 1 Schoales and Lefroy, 192, &c.; 2 Do. 502; *Walmesley* v. *Booth*, 2 Atkyns, 25; and *Newman* v. *Payne*, 2 Vesey, jun., 199.

But it appeared in this case that the defendant was the grandson of the complainant; that he had acted for seventeen years as steward; had had above three lacs of rupees, the property of the complainant, passing through his hands; and the only two items in the whole of his accounts which had been in the complainant's hands, and so proved, ever since the defendant's discharge, were law charges, to the amount of Rs. 800,

stated to have been expended by the defendant himself, and therefore improperly charged in the complainant's accounts; and also the balance of Rs. 2600, found to be against the defendant on the winding up of accounts, and which the defendant, in his answer, admitted to be against him, which was the item which the release, as the defendant said, was more particularly meant to cover and protect him against. It also appeared that two other servants of the complainant used to inspect her account books, and used, equally with the defendant, to inform her whenever any large sums were to be expended; so that, notwithstanding it was not questioned but that defendant was the principal *Mukhtár*, yet it was not evident that he was solely so, and that there was a continual check, as it appeared, held over him by these other servants, who were placed in their situations by the complainant, and not by the defendant. And it moreover appeared, that although the complainant was a woman of the age of nearly eighty years, and very illiterate, yet that she was quite in sound mind at the time of executing the release; and it was sworn to have been read over and duly interpreted to her in the presence of the attorney who drew it out, and also of two other persons, and of a servant of the complainant, but not in the presence of either of the accountant servants before mentioned.

The Court therefore rejected the petition for a rehearing, and confirmed the release.

No. XIII.

DOE DEM. HARROBEEBEE

versus

SHURFOONESSA.

January 1815.

THE Court, at trial, would not allow the defendant in this action, who had entered into the common rule to confess lease and entry and ouster, to shew herself out of possession of the premises sought to be recovered, evidence having been given by the lessor of the plaintiff that, five days previous to the filing of the plaint in ejectment, the defendant had been actually put into possession of these very premises under a writ of *hab. fac. poss.*, which she had obtained under judgment in a former action in the Supreme Court.

The Court, notwithstanding this opinion, did not disallow the rule which had obtained there twenty-five years, that it is part of the plaintiff's case which he has to make out at trial in ejectment, viz. the defendant's possession or occupation of the premises at the time of action brought.

No. XIV.

DOE DEM. KISSENCHUNDER SHAW *versus* BAIDAM BEEBEE.

January 1815.

THE plaintiff claimed to be let into premises, as mortgagee, under a deed executed to him by *A*, as the adopted son and heir of *B*, a Sikh, deceased, in whose possession the premises in question were proved to have been during his (*B*'s) lifetime. To prove the adoption, he called witnesses, none of whom could speak to, or knew of, any ceremonies performed such as are usual in cases of adoption. But three persons spoke to the facts of having often heard *B* call *A* his son, and of having at his death desired that *A* should possess all his property as inheritor, and that he should perform his *shrád*.

On being questioned by the Court whether they had ever heard *B* call him *adopted son*, they all owned they had not.

The defendant's case was this:—She had been married formerly to another Sikh, by whom she had *A*, her son. After her husband's death, she married, as was proved in evidence, *B*, and removed accordingly, taking *A* her son with her, to the house of *B*. She called witnesses to prove her marriage with *B*, and relationship to *A*. Her first witness stated that he was intimate with the family; that he was present at the marriage; and that if any other ceremonies had taken place in the family it was most probable he would have been invited to them; and that he never heard of *B*'s having adopted *A*; and that if no adoption had taken place, the defendant would inherit her husband's property as his heir, according to the laws and customs of the Sikhs. This witness had also, however, been present at the *shrád*, and stated that *A*, and not the defendant, had lighted the pile of *B*.

The defendant's third witness was interrogated by EAST, C. J., as to some points in Sikh law. In answer to which he stated,

1st, That the widow inherits the property solely of her husband, if there be no children.

2dly, That there is no difference between the rights of inheritance of a *Nikáh*, or second wife, and of a woman who had been married only once; and therefore,

3dly, That the widow of two husbands would inherit the property of her last husband, in the same right and manner as though she had never been married before.

4thly, That there may be adoption, and that ceremonies, though usual, are not indispensable to make adoption good.

5thly, That where there are a widow and an adopted or natural son left surviving an intestate, the widow is entitled to her share, or five-sixteenths of the intestate's property, and the son to the remainder.

6thly, It was asked by the Court, Whether would the widow or the son perform the intestate's *shrád?* and who must and ought to do so? and it was answered, that if there were a son, or an adopted son, he would perform all ceremonies; and if none, then the widow would do so. Which last answer seemed to determine the Court that this was strong testimony in favour of *A*'s adoption; it being proved that he had so performed the *shrád* of *B*, and that the widow was not even present at the ceremony.

EAST, C. J., put another *quære*, to which it was answered,

7thly, That a widow, who was a *Pardah* woman, might appoint a *Mukhtár* to conduct the ceremonies of her Cast. But the witness seemed to imagine that the touching the body and lighting the pile at the *shrád* were to be done by widow in spite of *Pardah*.

This last witness was the head of the Sikhs in Calcutta, and the Court thought it was best to ask his advice as to these points, and that they must be guided by the answers; and they thought that the evidence in favour of the adoption was completed by what was answered respecting the son's and the widow's rights and duties in the ceremony of the *shrád;* and therefore that the lessor of the plaintiff must recover on his mortgage from the adopted son *A*. But some doubt occurring as to the widow's five-sixteenth share, and whether the son could have

any power to mortgage that portion at least of the premises, it was further asked and answered,

8thly, That the son, as *Mukhtár* of the whole estate, might be empowered by the widow to dispose of his share by parol, in the same manner as an elder brother, or *Mukhtár* of an undivided Hindú family, may bind the whole family estate by his acts.

The Court now thought the case clear against the defendant, and that as she and *A* had always lived together, they might presume her consent to this incumbrance on the property, and even her and *A*'s collusion in the defence of this action. The defendant, however, had proved that she, and not *A*, was in the receipt of the rents of the property. The witness who spoke to this did not, however, actually pay this rent into the defendant's hands, as she was a *Pardah* woman, but he said he paid it to his wife that she might pay it over to the defendant. The wife had not been subpœned so as to prove the actual payment to the defendant.

The Court seemed to think that this part of the defendant's case was proved, but they, however, gave judgment for plaintiff.

Note by East, C. J.—The evidence in support of the adoption seems very loose and general. As to *B*'s calling *A* his son, it was nothing more than what was natural and right, as he was, in fact, his son-in-law; and I cannot help thinking that *A* might well have been appointed by the defendant to act for her at the *shrád*, and that the property was always treated as hers.

No. XV.

DOE DEM. GOROOPERSHAD SOOKOOL

versus

GOURMONEE DOSSEE.

Same Sittings.

Ejectment by the purchaser, for a valuable consideration, to recover premises sold by the vendor, who had had possession of the title deeds of the premises for nearly twenty years, drawn out in his own name as the purchaser from the original owners under the following circumstances, which would have been given in evidence, and so tendered by the defendant.

One Juggernaut Roy, who was *Mukhtár* of the brother of Rasmonee Roar, was desired by the latter to purchase these premises twenty years ago, and that the conveyance and bill of sale might be made out to her in his name; she, in fact, having paid the purchase-money with her own hands to the vendors, and choosing only, with the absurdity of a Hindú lady, to take the premises under a fictitious name incautiously chosen. She took possession of the premises, and going subsequently to Moorshedabad, shortly afterwards died, leaving the bill of sale, &c., in the hands of Juggernaut, her *Mukhtár* of the purchase, as it was originally deposited. Her two sons took possession, and received the rents, &c.; but shortly after the death of Rasmonee, one of these sons also died, leaving the defendant, widow and sole heir, him surviving. The other surviving brother managed the estate and received the rents till his death, which happened fourteen or fifteen years afterwards. He had made a will in favour of the defendant, his sister-in-law, bequeathing her his share in the premises, so that she was now become sole owner of the estate. Proof was also tendered of her having been in the receipt of the rents of the premises in question till dispute began to be made by the now purchaser; since when, the tenants, who had already been called on the part of plaintiff, proved that the rents had been in abeyance, both parties claiming, and the defendant having of late distrained. The plaintiff's witnesses had proved, also, that for the last sixteen or eighteen years Juggernaut had not been in Calcutta, and that he had never been on the premises; but one witness swore that he had heard him give directions to one of Rasmonee's sons to receive the rents for him; another, a tenant, owned that he had been, as long ago, placed by that son on the premises; and all had in fact paid rents to him. It was also proved, on cross-examination of the plaintiff's witnesses, that at the late sale and purchase of the premises effected by Juggernaut, he, Juggernaut, had not been on the premises at all in person, but that the purchaser, the lessor of the plaintiff, had been put into possession by an agent; and indeed there seemed to be but a lame account of the execution of the purchase, both as to the place where it was effected, and the manner of payment; and there seemed great reason for suspecting some fraud and collusion between the lessor of the plaintiff and Juggernaut the vendor.

But the Court were of opinion that the defendant could not be let in to prove her title, the original purchase deeds having been made out in Juggernaut's name, and the continual possession of the same out of the defendant, notwithstanding that possession of the premises might be proved in the defendant and her ancestors; for it would be opening a great door to fraud, if not only the deeds were made out in a feigned name, but that they were so long out of the possession of the real vendee, and that it was gross laches in such vendee, and giving an opportunity to another of imposing on the world.

It was further held, that the Supreme Court had never gone beyond admitting proofs, dehors the bill of sale, &c., as to the name of the real purchaser; but that in such cases they had always required it to be shewn that the title deeds of the estate were in the possession of such real purchaser, which here they were not: that it was true they had so far relaxed from the statute of frauds as to admit parol evidence of title, but this was always accompanied with actual possession of the title deeds; and they expressed an aversion to extend this relaxation one step further than had already been done: and that they always expected possession of title deeds to be shewn, as well as possession or receipt of rents.

The defendant offered to prove that Rasmonee had had possession of the bill of sale immediately at the purchase of the premises, and that in consequence of her journey to Moorshedabad she had re-delivered the deeds to Juggernaut.

But the Court thought this no answer to the objection, because, by so doing, she had put the means of defrauding into Juggernaut's power for these eighteen years past at least; and as the journey was almost directly after the purchase was made, the laches was still much too extensive for expecting redress.

The defendant had judgment against her accordingly, without having her case heard in evidence;

But not till *Mr. Strettell* had most ably discussed her law *contra.*

No. XVI.

MOHON LOLL TAGORE

versus

NOROOJEE CAHOOJEE.

1st February 1815.

ASSUMPSIT for non-performance of contract by defendant.

It appeared that two brokers, employed between the plaintiff and defendant in this cause for bargaining the sale and purchase of some *Kalamí* saltpetre, gave different memorandums of the terms of the sale to the two parties, neither the plaintiff nor the defendant having ever seen, before this trial, the terms of the contract contained in the memorandum delivered to the other.

The Court held, therefore, that neither contract was binding or good, and that parol evidence therefore was admissible to find out what was the actual understanding of the two contracting parties.

In this case the contract appeared, and was admitted to be for saltpetre of a peculiar quality, viz. *Kalamí*, which signifies being white and in large flakes like reeds, and of the best quality generally, though there was said to be some differences even in *Kalamí* specifically; and it was also for a certain quantity, viz. 1400 maunds, more or less. And it was held, that the purchaser was not bound to take any part of that quantity, if the larger residue were not of the quality and denomination of *Kalamí* according to the agreement. It came out clearly in evidence that the larger quantity put by in the plaintiff's warehouses for the defendant's acceptance was not *Kalamí*, but of a very indifferent quality. And then arose a question, whether one-fourth, or thereabouts, having been weighed out by the defendant's people, and set aside in the same warehouse where the remainder was deposited, before the fact of its being of inferior quality came to the defendant's knowledge, the defendant had in fact accepted this portion. And it was held, that the contract for the purchase of a certain quantity being a whole, the defendant was not bound by an implied acceptance of part; and cases to this point were noticed by the Court in giving judgment for the defendant, viz. *Graham v. Jackson*, 14 East, where, in a contract for 300 tons of campeachy wood, reference was made to arbitration, under which the vendee agreed to accept whatever part might be found to be campeachy; so that

at the period of action the vendee had in fact agreed to a part acceptance, besides which, the greater part, viz. 284 tons, were actually found to be of the denomination specified, and the recovery was had for the price of the 284. *Warranton v. Oliver*, Bos. and Pull. Rep., was also quoted. 1 Campbell, N. P. 113; Ditto, 192; and *Hunter v. Rice*, 15 East; and for the binding of contracts by brokers; 2 Campbell, N. P. 337; *Powell v. Divell*, 15 East; and vide Paley's Principal and Agent.

The Court, besides, seemed to be of opinion, that, in fact, there was no part acceptance by the defendant, because the weigher who went to the plaintiff's godowns to weigh the article was not his agent for any other purpose, was merely ministerial, and the proof was, that so soon as ever the musters of the commodity, &c., found in weighing, &c., to be bad, were sent to the defendant by the weigher, the defendant himself desired an end to be put to the weighing, and the quantity weighed already still remained accordingly, to the time of the trial had, in the godown of the plaintiff unremoved.

The plaintiff had in his declaration a count for use and occupation of his godown, there were two special counts, and a count for goods sold and delivered to the plaintiff, and another for delivery to plaintiff's man.

No. XVII.

SYED TAFFY ALLY KHAN

versus

BABOO JUGGERNAUT.

1*st March* 1815.

Compton moved for leave to enter *non pros.* against the plaintiff, he not having yet given the defendant a bill of particulars, according to the terms of the Judge's order, granted on the 5th of July last, and no proceedings therefore having been had for two terms, which the spirit of 63d rule[1] requires.

Counsel on the other side objected that there was no such rule either here or in the K. B., and that the rules in both Courts are for not proceeding within two terms after the last pleading put in, which an order for particulars is not.

Sed per Curiam—If the bill of particulars be not given in eight

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[1] 2 Sm. and Ry. 89. par. 3.

days, and if the plaintiff should not pay the costs of this motion within that time, and undertake either to try this term, or in the sittings afterwards, that judgment of *non pros.* be entered.

No. XVIII.

MUDDOOSOODEN SANDELL

versus

March 1815.

MOTION was made by the *Advocate General* for leave for the Clerk of the Crown and Keeper of the Records to attend with the affidavits put in this term by the next friend of Chumpuck Mollah Dabey, as grounds of an application on her behalf for a *Habeas Corpus*, that he might carry them before the Grand Jury, in order to enable them to find a bill for perjury.

Refused by the Court. Because no grounds were laid for such an application, which the Court thought necessary in a case of this sort, of which they had already had some knowledge, and that by no means creditable to the party who now applied; who, instead of returning to a *Habeas Corpus* sued out against him as above, had come lately into Court in order to object to making any return whatever to the writ.

N.B. A return to the writ, in the original cause, of *Habeas Corpus* was afterwards made, denying the detention *in toto*, some fruitless objections having been first stated, as to the jurisdiction of the Court to send such a writ into the Mofussil, without having proved the person, to whom it was directed, to be subject to the jurisdiction, though he was so, notoriously, by reason of inhabitancy.

Chumpuck had brought a bill for an account, as widow of *A B*, against her son lately, to which no answer had been put in. It was also objected that it was an unheard of writ, to bring before a Public Court a Hindú woman of the Brahman Cast. She had been, in fact, laid hold of and carried by force out of Calcutta, after filing her bill, by an armed force, and attempts were alleged to have been made to induce her to withdraw it. Many cases were cited as precedents to authorize *Habeas Corpus* in cases of Hindú women, and some even of Brahman women.

No. XIX.

DOE DEM. ARRATOON GASPAR
versus
PADDOLOCHUM DOSS.

9th November 1815.

THE facts proved in this case were—The lessor of the plaintiff's father, Gaspar Arratoon, purchased the premises in question eighteen years ago, and died seised in the year 1800, leaving his widow executrix, and several infant sons. The widow disposed of the property in fee for its full value, to the defendant's sister, in 1806, the infants joining her in making a conveyance by a common Bengálí bill of sale. There was no proof that the lessor of the plaintiff, or either of the infants, received any part of the purchase-money; but it was proved that the testator died in solvent circumstances, and without making any disposition of the premises, which accordingly descended to his eldest son, the lessor of the plaintiff, alone, he being an Armenian, according to the law of England. The lessor also proved that he had lately gone on the premises, put one foot on the threshold of the house, and made actual entry, and had seen the defendant there and claimed them as his property, he offering at the same time, for the honour of his mother, the vendor, to repay the defendant's purchase-money; and this being refused, he brought this action for them.

Mr. Advocate General, for the defendant, contended that the widow had power, as executrix, to sell these premises; real property in India being exactly on the same footing as personalty, and equally liable to executions for simple contract debts, &c., and that she had, therefore, only done what she might do even without the co-signatures of her sons, however she might be answerable over to them for misapplication of assets, &c.; and he quoted the Charter, A. D. 1774. Sect. 15, which he said shewed that realty was to be considered in every respect as personalty in India. He also quoted *M'Leod* v. *Drummond*, 14 Vesey, 353—63, to shew the executor's power of disposing of a testator's property in the case of personalty. And he then contended that the case of *Zouch* v. *Parsons*, 3 Burr. 1794, was exactly similar to this, which was the case of a mortgage on land coming to the power of the executors, the mother and infant son, who were also residuary legatees; and

they having joined in a conveyance of the land, the question was, whether the infant son, as mortgagee, could make a good conveyance, or whether he, by entry, could afterwards defeat it; and it was held, that he could not defeat it, and that his and his mother's conveyance of the land was good, they having received the mortgage-money; and, moreover, that the infant was in that case bound to assign it over. He also cited *Farmer* v. *Rogers*, 2 Wils. 27; *Keil's case*, Moore, 144, and *Blunt* v. *Clarke*, 2 Siderfin.

Sed. per Curiam—The case in 3 Burr. was not that of a disposition, as here, by an infant of any beneficial interest in real property; for he was there the mortgagee heir merely, and was therefore bound to convey over the land when the mortgage-money was repaid; and so, when he made a title to a purchaser of the mortgage for value received, the proceeds reverted back, as they ought, to the executor's fund, of which he and his mother were to have the disposition: he parted with no interest but what he had no right to retain. There, too, there was a deed and delivery, whereas this grant is only by bill of sale, which is not, as the deed and delivery are reckoned, at all tantamount to a feoffment. But the great distinction between this case and that is, that there, there was at least a semblance of benefit to the infant, sufficient to make this conveyance voidable only at least; and here the conveyance is against the infant's benefit, for it does not appear that he received any of the purchase-money, but the mother all. And his late entry and claim on the land have shewn his disallowance of the sale; and, 2dly, in these bills of sale there are neither seals nor delivery. 3dly, As to the doctrine attempted to be sustained by the *Advocate General*, that in the case, as this was, of an Armenian family, which is just the same with British subjects as to the laws of property in India recognized, real property is to be considered exactly as personalty, the Court entirely dissented from it, and said that the power given under the Charter cited to seize realty in execution, was merely a power given to the Court, and not by any means to the executor or mere personal representatives, as it distinctly appeared by the words there used, viz. "after judgment;" so that though the Court may do so at their discretion, the executors cannot *mero motu*. And moreover, were any such power intended to be given to executors, it must certainly be con-

sidered tenderly and cautiously, and only in favour of assets personal. But in this case there is no pretence for alleging insolvency, or want of assets for paying off debts, and then the sale of realty was merely wanton.

The *Advocate General* declared that this decision would invalidate many titles to realty in India, and overrule many judgments of the Supreme Court.

But the Court denied this, and gave judgment for the lessor of the plaintiff, with costs, saying they did so in order that the lessor might be induced to renew to the defendants, who were innocent purchasers, the offer of repaying the purchase-money.

No. XX.

DOE DEM. KORA SHUNKO TAKOOR.

versus

BEBEE MUNNEE.

24th November 1815.

THIS was an action of ejectment, brought by the nephew, by the sister's side, of a deceased Brahman, against the widow of the latter.

The lessor claimed on two grounds: 1st, As heir by adoption; and, 2dly, As having been appointed *Málik* by the deceased in his lifetime.

The first ground was done away with, in the first instance, by the Court taking the opinion of the Pandits, who declared that a Hindú or Brahman could not adopt his sister's son, as it imports incest.

The lessor of the plaintiff, however, relied on the declarations of his deceased maternal uncle, frequently made, and repeated recently before his death, in favour of the lessor, as to his inheritance. Three witnesses stated that the deceased had said to them, in presence of the lessor, "I will make this my nephew my *Málik*." One witness heard, "I have made him *Málik* of all my possessions in your presence." There seemed great doubt as to the truth of these statements, two of the witnesses having stated that no other person was present when the deceased thus expressed himself to either of them respectively, and the third saying that he and the two others were present all at the same time; and it seemed to be the opinion of the Court that had the deceased expressed himself unequivocally in favour of his nephew's

succeeding to his fortune, either by nuncupative will or present gift, according to what might be the construction of the words, that if it were said openly, in the presence of the family and others, collected for that purpose formally, this would have been a good disposition of his property; but they would not credit such vague and unsatisfactory evidence of words given to one or two individuals separately, particularly as in this case the deceased was proved to have been in tolerable health three days after these expressions in favour of his nephew's succession. The facts proved by the plaintiff were, that the deceased had sent for his nephew from the country to come and live with him eighteen months before his death; that the nephew lighted the funeral pile of the deceased, and performed of the *Shrád* all the ceremonies except the *Sapindaka*, which the defendant, the deceased's childless widow, performed.

But for the defendant it was proved that she was *enceinte* at the time of burning her husband's body, and that she was dissuaded, therefore, from doing this service, by reason of her situation, which would thus have made it indecorous: the child was afterwards still-born. The defendant had been in possession three years, having turned out the plaintiff one month after the decease of her husband.

Judgment for the defendant.

No. XXI.

MUDDOOSOODEN GHOSE

versus

GIBSON.

29th June 1820.

THE defendant having been arrested at the suit of the plaintiff in this Court, within the Danish territory at Serampore, and forcibly brought within the jurisdiction of the Supreme Court. Application was made for his release by the Danish government to the Governor General, who referred him to the Supreme Court.

Spankie, A. G., on a former day, accordingly applied for a rule to shew cause why the defendant should not be discharged. Upon the defendant's petition to that effect having been read, and the affidavits in support of and against it, and the arguments of counsel, which

turned altogether on the fact, whether the arrest were or were not made within the Danish territory.

The Court, being satisfied that the arrest had been made within such territory, made the rule absolute for the defendant's discharge.

The defendant was a British subject, then residing at Serampore to avoid his creditors.

No. XXII.

REX

versus

BUCKINGHAM.

15*th November* 1820.

Spankie, A. G., moved for a criminal information to be filed in this Court against the defendant for a libel on the Governor-General. The question was mooted as to the jurisdiction of the Court, out of Sessions, to grant a criminal information, in consequence of doubts thrown out by M'Naghten, J., upon a former occasion while at Madras; and the *Advocate General* contended shortly for the power upon the words of the Charter and the several Acts of Parliament passed relative to the jurisdiction of the Court.

The Court now granted a rule to shew cause, the same Judge still doubting; and upon cause shewn, the rule was made absolute in the following term, the 1st of 1821, when the Chief Justice stated his reasons for upholding the jurisdiction.

No. XXIII.

GOBEY DOSSEE

versus

GUNGORAM DAY

27*th November* 1820.

In an action for an assault, it appeared that the defendant had summoned the plaintiff upon a complaint against her by the defendant at the police; and that when the summons was served upon the plaintiff in the road by the *Peon*, the defendant pointed her out to him, and in so doing touched her cloth. The witness swore that such a mode of serving a summons on a woman in public was a degradation of her, and that he believed that the defendant touched her intentionally.

The Court Pandit, on inquiry, said, that even if the touch were intentional, yet the plaintiff being a Súdra, and the defendant a person of superior Cast, it was not unlawful.

Besides which, the occasion appeared to the Court to be lawful: the defendant touched the plaintiff to point her out to the *Peon* who was to serve the notice of summons upon her. The plaintiff was nonsuited, with costs.

No. XXIV.

SIR W. BURROUGHS (PUISNE JUDGE)

versus

GOPEENAUT BOSE AND OTHERS.

29th January 1821.

THIS was an action of debt upon a recognizance entered into by the defendant and his sureties by virtue of the 68th Rule[1] of the Court, on the Equity side, to account to the Master for the estate of an infant, of whom he had been appointed guardian. The defendants pleaded, 1st, No such recognizance; 2d, No money received by the defendant, Gopeenaut Bose.

Accounts were proved to have been filed by Gopeenaut up to a certain date, and admissions of monies received; but the account was not finally settled, so as to fix with certainty to what extent the sureties were bound to make good the defaults of their principal.

Therefore the Court, after hearing counsel, gave judgment generally for the plaintiff upon the recognizance, with a stay of execution, and subject to the further order of the Court; but by consent of the parties it was referred to the Master to take the account, in order to ascertain the sum.

No. XXV.

GOOPENAUT CHOWDRY.

versus

BISSONAUT MALACAR.

22d March 1821.

UPON an action on a special agreement for the value of goods furnished to one Garachund Buckshee upon the security of the defendant, a question arose, which was referred to the Court Pandit present; whe-

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[1] 2 Sm. and Ry. 130. par. 1.

ther, by the Hindú law, a bare promise by one to pay the debt of another, without any consideration of benefit to the party promising, or of detriment to the other, was good. The Pandit answered that it was not good.

But the defendant failed to shew that the goods had been furnished to Garachund Buckshee before the promise was made; and therefore the Court gave judgment for the plaintiff to the value, as upon an original undertaking, which induced the credit.

No. XXVI.

BYJENAUT SING

versus

CHARLES REED, AND RAJAH JHA, DECEASED, AND HIS REPRESENTATIVES.

21st June 1821.

Fergusson moved, upon notice, that the appeal of Mr. Reed, as a British subject, from the judgment of the Provincial Court at Moorshedabad, to this Court, under the Statute 13th Geo. III. c. 63., be received and filed. It appeared by the affidavits that Mr. Reed was a native of Bengal, born of a native woman out of wedlock, and that his reputed father was a British-born subject, and that he himself was a Christian. And it was contended on his behalf, that being born within the allegiance of the King, he was therefore entitled to be considered as a British subject in law, and to have all the privileges of such. Admitting, for argument's sake, that the Charter, and many of the Acts of Parliament, appeared to make a distinction between the *natives* of India and British-born subjects, yet that distinction was only intended to hold originally as between British Christian subjects and such natives as were Hindús or Muhammadans; and that, at all events, the distinction between British-born and native Christian subjects of the King, born within the allegiance of the Crown, was altogether done away with after the supremacy of the Crown over the dominions of the East-India Company was declared by Parliament in the Statute 53d Geo. III. c. 155. At the time of the Charters of Geo. I. and II., while the Mayor's Court was in existence, the British Government could scarcely be said to be in existence over the natives, but their jurisdiction was confined to

British-born subjects within the British factories. The second Charter of Geo. II., in 1753, which embodies the Charter of Geo. I., gave that Court power to determine suits between party and party, except such suits as should arise between the Indian natives only, which were to be determined between themselves, unless by their consent; but that provision never could have been intended to include, as Indian, even the natural sons of British subjects, being Christians. The words "*British subjects*" did not occur before the existing Charter of the 13th Geo. III.; and there was no express provision made for civil jurisdiction over *natives* till the Statute 21st Geo. III. c. 70. If these persons are not to be considered as British subjects, they must be subject to the Muhammadan law in the Mofussil, in respect of inheritance, succession, marriage, &c., and also for all criminal jurisdiction. The Statute 37th Geo. III. c. 142., as to Madras, shews who are meant by *natives*, viz. persons before subject to such law as they would have been governed by in the native courts: so the preamble to the Statute 21st Geo. III. c. 70. speaks of preserving to the inhabitants of India their ancient laws. How is that applicable to such a person as Mr. Reed? The Statute 33d Geo. III. c. 52. which refers to the particular places of birth of British subjects, must have intended such persons so described in contradistinction to British subjects in India, but not in exclusion of their general rights; and it is sufficient to constitute a man such, that he be born within the King's allegiance of parents also subjects of the King. *Calvin's* case, Blackstone's Commentaries; *Bald's* case, Dyer 224. It cannot be doubted that Armenian and Greek Christians born here are British subjects, and might sit in Parliament; and Mr. Reed belongs to the same class. These arguments were also supported by *Compton*.

Spankie, A. G. was prepared to oppose them.

But the Court said that it had been often before decided, that a person circumstanced as Mr. Reed was did not come within the meaning of the term "*British subjects*," as used in the Charter and in the various Acts of Parliament, some of which specified the very places of birth, not including India, and in all of which there was an intentional line of demarkation between native-born and general British subjects in matters of government, trade, and judicial administration: that the very prohi-

bition of British subjects to colonise in India marked the same distinction; and whether the policy were well or ill-founded, it was plainly intended to exist in operation by the enactments of the legislature from time to time; and if there were any error, it must now be set right by the same authority. And the same decision having once before been given in the case of this very individual, as well as on other occasions, the Rule was discharged with costs.

There was no appeal.

No. XXVII.
RUSTOMJEE COWASJEE.
versus
DODSWORTH.

12th July 1821.

Fergusson and *Compton* shewed cause against a Rule which had been obtained on behalf of a separate creditor of the defendant Dodsworth to levy execution upon a judgment obtained, in respect of goods in the hands of the Sheriff under a sequestration, at the suit of a joint creditor of Dodsworth and one Howell who had been partners. They referred to Montague on Partnership, 208; 1 Show. 173; 4 Ves. Jr. 396; 1 Salk. 392; 2 Lord Raym. 871. They argued that by the Charter a sequestration in this Court was not merely a security to compel appearance, but also to secure the debt if recovered. Sect. XV. of the Charter requires it to be reasonable and adequate to the cause of action. The Court is to order the goods sequestered either to be detained in specie, or to be sold, &c.; and after judgment for the plaintiff, the Court is to issue a writ to the Sheriff commanding him to sell the said houses, &c., goods, &c., so sequestered, and to make satisfaction out of the produce thereof to the plaintiff. In this case the plaintiff had obtained a warrant of attorney from the defendant Dodsworth to confess judgment after the goods were under sequestration, and judgment was entered up on the 7th of January; and the plaintiff's writ of execution was delivered to the Sheriff on the 3d February, subject to the sequestration of the goods by the other joint creditor.

Spankie, A. G., and *Hogg*, in support of the rule. The Sheriff had originally seized the goods and sold them under a writ of *fieri facias*,

at the suit of this plaintiff against Dodsworth and Howell, and after satisfying that debt there remained Rs. 90,000 in his hands: the sale did not take place, as appears by the Sheriff's return, till after the 3d of February. In the mean time, however, and before the plaintiff's execution against Dodsworth upon his single bond (though also given for a joint debt), was delivered to the Sheriff, the opposing separate creditor had delivered his writ of sequestration to the Sheriff. After the writ of execution the property seized and sold became money, and was no longer sequestrable, but under the orders of the Court, as in their custody, or *in custodiâ legis:* at any rate, a sequestration is not an execution, but only mesne process to compel appearance. The Statute 9th Geo. II. for regulating sequestrations in Chancery contains nearly the same provisions as the Charter, and there can be no proceeding in ejectment against property in sequestration, without leave of the Court. They cited *Gibson* v. *Scevengton*, 1 Ver. 247; *Shaw* v. *Wright*, 3 Ves. 22; and *Angel* v. *Smith*, 9 Ves. 335.

The Court, however, were of opinion, upon the settled practice, that the sequestration of the separate creditor, who had been guilty of no laches, having come into the Sheriff's office before the writ of execution under the plaintiff's judgment, should have the priority, and discharged the Rule. The sequestration is a security for the judgment.

No. XXVIII.
BISSUMBER MULLICK AND OTHERS
versus
STUBB AND DURHAM.

21st January 1821.

THIS was an action for goods sold and delivered, and upon an account stated, &c., to recover Rs. 12,129.

It was proved that the goods were purchased at a certain credit, and were to be paid for on a given day, and were not in fact paid for after many months, on which this action was brought.

The first question was, whether interest was to be allowed from the day on which the payment was agreed to be made; and a witness was called (who was not contradicted, and might have been supported by many more) who proved that it was the constant usage of trade in

Calcutta, when goods were sold to be paid for at a given day, that interest should be allowed if the money were not then paid.[1]

The Court was of opinion that this was proper evidence, and gave judgment for the amount, with interest at six per cent.

The second question was as to the rate of interest, which had for many years been settled at ten per cent. in the Supreme Court, when no other rate of interest was contracted for, and it had used to be called by the name of Court interest. But on this occasion, as on several others about this time, the Court, considering that the rate of ten per cent. had been originally fixed as a moderate amount, when twelve per cent. was the common rate, and that for two years past and more the rate of interest had been very considerably reduced, declared that they would not allow more than six per cent.

Upon one or two old transactions the higher rate was allowed.

No. XXIX.
BURNE
versus
TREBECK.

29th October 1821.

THE plaintiff, having sued an attorney of this Court in the Petty Court, the defendant moved on a former day for a *certiorari* to remove the proceedings into the Supreme Court, upon his privilege of an attorney, in analogy to the privilege of attornies of the superior Courts of Westminster, and in order to quash them.

Spankie, A. G., and *Compton*, now shewed cause against the rule. The defendant filed a plea of privilege in the Petty Court, in which he stated that the privilege was *by prescription*. That was proper as applied to the Courts of Westminster, but is quite inapplicable to this Court, founded within fifty years. The like observation applies to another allegation in the plea, that the privilege was founded upon

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[1] Note by SIR E. H. EAST.—So in another subsequent case at the same sittings, *Bycauntnaut Paul Chowdry* v. *Briabrummer Bundopadiah*, interest at six per cent. was allowed upon an account stated, which was made payable by instalments on certain days. The same usage had once, if not twice, before been proved by several respectable witnesses before me in this Court, though it was questioned in this case by the counsel for the defendant.

ancient custom that every attorney was bound to attend the Court. The Court of King's Bench was formerly ambulatory, and followed the King wherever he went; but the same reason does not apply here. This Court has the power of admitting barristers and attornies *ex suo jure*, and not because the Court of King's Bench does the same. The barristers, indeed, are admitted by the Inns of Court. The case in 3 Burr. 1583, only decided that an attorney was privileged from being sued in the old London Court of Conscience, but the privilege has been excepted in several Courts of later erection, as in that of Bath. Here, too, the Petty Court has general jurisdiction over all debts of a certain amount. The Charter does not give the privilege of being sued exclusively in the Supreme Court to the attornies; and such a privilege, not being founded in justice or policy, ought not to be extended by implication.

Fergusson and *Hogg* in support of the application. This is a privilege attached to every superior Court of Record, and is a privilege of the clients, as well as of the attornies of the Court. It is true the privilege is not immemorial, because this Court is recent; but this Court is constituted with the same powers and authority as the Court of King's Bench, and this is an incidental power belonging to it: if it do not exist for the attornies, neither can it exist for the barristers, nor even for the Judges themselves. There is nothing impolitic in the privilege, for it only protects them against arrest in the first instance, not against execution; and the public have a benefit on the other hand, for the attornies are subjected to summary proceedings against them by attachment for misconduct. In 2 Wils. the Court say that an attorney cannot have the privilege, because it is not his privilege, but that of the Court and clients: this shews it to be founded in public policy, and part of the law of England. 1 Dough. 381.

The Court agreed that no privilege existed in the case of the officers of the Court. It is not a matter of practice merely; for as such only it might be changed by the Court themselves, which it cannot now be; but it grew by degrees at Westminster, and was bottomed in immemorial custom, though the reason of it may have, in great measure, ceased, since all the superior Courts became stationary, which the King's Bench originally was not; and there is no reason for extending it here, when nothing is said in the Charter respecting it, and it is only

in matters of mere practice that we are to follow the Court of King's Bench, when we have no different rule of our own: on the contrary, the Judges are, by an express provision, exempted from arrest in civil suits, and no other exemption is made.

This decision does not preclude the Court from granting a *certiorari* to remove any cause out of the inferior Court, upon any proper ground, on the application of an attorney; and so, *à fortiori*, if an action were brought against a barrister or Judge.

No. XXX.

EXPARTE LOKECAUNT MULLICK AND OTHERS.

20th March 1815.

Compton moved, upon the 68th rule on the Equity side,[1] that Rooploll Mullick, the guardian of these infants' estate, should pay into the Accountant General's hands seven lacs and Rs. 68,873.5 annas, 8 pice, and stated that Rooploll was appointed guardian on the 19th Nov. 1812, and had filed his account in Jan. 1814; and on the 1st July following had received notice from the Accountant General to pay in his balance, and he produced the Accountant General's certificate that no money had been paid in.

The *Advocate General* and *Fergusson* opposed the application in the first instance, and urged, 1st. That the Court had no power to appoint a guardian to a Hindú's estates, and that a bill had been filed on the 25th July last by Cossinaut, the eldest brother of these infants, who had attained his full age, on his own behalf and that of his infant brothers, and by Sreemutty, the mother, against Rooploll, the guardian, to set aside the guardianship, and that there was a decree that all the defendants should account. They contended that the 68th Rule does not apply to Hindús, and that Rooploll could not by law comply *in toto* with the requisition; for that Ramlochun, Juggermohun, and Rooploll, formed one undivided Hindú family, and that all the Company's paper mentioned in Rooploll's account was joint ancestral estate, and was partly in the name of Ramlochun, partly of Juggermohun, and partly of Rooploll, subject to the claims of Sreemutty, the widow of Gowerchurn Mullick, the father; and that Rooploll could only indorse the paper in his own name.

[1] 2 Sm. & Ry. 130. pai. 1.

Per Curiam. Let Rooploll, the guardian, pay into the Accountant General's hands the share of the infants in all such of the personal estate in his hands over which he has the legal disposition.

No. XXXI.

DOE DEM. JUGGOMOHUN MULLICK AND OTHERS *versus* SAUMCOOMAR BEBEE, LOLL SING, AND JUGGER SING.

29th March 1815.

In this ejectment there were three different demises; the first by the representatives of Omichurn Mullick for one moiety; the second by the executors of Nemoychurn Mullick, and also the executors of one Heera Sing, for the other moiety; the third by Ramconnoye Mullick.

The defendants admitted the title of the lessor of the plaintiffs, if the said Heera Sing had a title to the whole of the premises for which they defended.

The persons from whom both made claim were Sikhs of the Khythy[1] Cast, and Hindús. Huzzoy Mull, the brother of Omichurn, had a son named Moteychurn, who died in his lifetime, in 1781, and either purchased this estate for his son, Moteychurn, or out of his son's money. Moteychurn left a widow, Seecowr, who died in 1805, and a son by her of the name of Heera Sing, who was quite a boy at his father's death, and died seven or eight years before this action was brought.

Moteychurn also left another son, Puttychurn, whom he had by Motee, a slave girl; and this gave rise to the questions after-mentioned. Saumcoomar, one of the defendants, was the widow of that Puttychurn. The others were tenants. Puttychurn lived on the ground in dispute till his death, having resided there even in his father's lifetime. Puttychurn left no issue. Some of the plaintiffs claimed under a mortgage made by Heera Sing and his mother Seecowr, after the death of Moteychurn, assuming to mortgage the whole estate of Moteychurn.

The question mainly turned upon the title of Puttychurn, the other son of Moteychurn by the slave girl.

Strettell, A. G., contended that Puttychurn, as such son, was entitled

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[1] Thus in the original, *sed Quære*, Kshatriya.*

to half the inheritance of his father, by the Sikh law, which made no difference between a son by a slave or by any other woman to whom he was regularly married, the Sikhs having a secondary marriage, called *Anand*, which gave the same rights to the issue as a regular marriage.

The Court, however, were all of opinion that the right of inheritance to land must depend upon the law of the province in which the lands lay, and not upon any foreign law; and the Sikhs being a sect of Hindús must be governed by the Hindú law.

The Pandits were thereupon called in to answer the following questions.

1st. *Q.* By the Hindú law, can a son by a slave girl inherit the land of the father?

A. The son of a Súdra by a slave girl would inherit, but not the son of a Khythy, or Brahman, or Bhyee,[1] by a slave girl.

2d. *Q.* If a Súdra have a legitimate and an illegitimate son, will the latter be entitled to share any, and what, portion of the inheritance?

A. The illegitimate son will take only half the share of the legitimate son; *i. e.* the legitimate son would take two-thirds, and the illegitimate son one-third.

3d. *Q.* Would a Khythy lose his Cast by becoming a Sikh?

A. No. The worship by a Sikh is only a particular kind of worship, which would not hurt his Cast.

4th. *Q.* How would that be as to a Brahman?

A. By a Brahman becoming a Sikh, we understand his associating with Sikhs in a particular kind of worship, and this would not be injurious to his Cast. If, indeed, a Brahman were to relinquish his own forms of worship, or eat with Sikhs, he would be an outcast; but if he continued his own forms, his merely associating with Sikhs in their form of worship would not cause him to lose his Cast.

5th. *Q.* If a Brahman were to lose Cast among the Sikhs, and die, how would his inheritance in Bengal go? would it be governed by the Hindú law of his Cast?

A. How lost? If he have merely lost Cast he may retrieve it.

6th. *Q.* If he have lost Cast, and died without retrieving it, how then?

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[1] Thus in the MS., *sed Quære*, Byee, *i.e.* Vaisya.

A. Expiation by penance will remove the obstacle. The sons may remove the obstacle. If sons be born to a man before the loss of Cast by him, their rights attach, and cannot be lost by the father's subsequent loss of Cast; or if lost by the father before their birth, they may retrieve it. But if a man wilfully persevere in that which is a loss of Cast, then, though he may expiate his sin by penance, he would not be restored to the rights of intercourse of his Cast.

7th. *Q.* If a Khythy marry a slave girl, will his son inherit?

A. Yes, if she were of his Cast.

8th. *Q.* Is there any marriage ceremony called *Anand?*

A. We know nothing of such a ceremony.

9th. *Q.* If a Sikh Khythy man and woman were married according to the Sikh rite of marriage in Bengal, would that marriage be recognized as a valid marriage by the Hindú law, so as to transmit inheritance in Bengal?

A. The marriage would be considered as valid, and the offspring would inherit.

10th. *Q.* Is there a particular form of marriage by the Hindú law?

A. There are eight forms of marriage by the law.

11th. *Q.* Would a marriage be good if not celebrated according to one or other of those eight forms?

A. The eight forms are mere forms and ceremonies. The marriage is constituted by the persons saying, "I marry," &c. &c., and agreeing to marry. It is the contract of marriage which is the essence of it.

After this, many witnesses were called, who proved the marriage of Moteychurn with Motee, the mother of Puttychurn, the slave girl before mentioned; which marriage took place about two years after his first and regular marriage in the *Shadí* form with Seecowr, the mother of Heera Sing. The marriage of Moteychurn with Motee was according to a secondary or inferior form amongst the Sikhs, called *Anand*, which is the same as that called *Nikáh* amongst the Musulmáns. Motee was also proved, by reputation, to be of the Khythy Cast. Though the Sikhs examined as witnesses appeared to consider that the sons by the *Anand* form of marriage would inherit equally with those by the *Shadí* form (or *Beeah*, as the Sikhs denominate it), and this without any refe-

rence to Cast. The *Anand* text, as it was described, was read jointly by several of the Sikhs present at the ceremony, in the presence of Moteychurn and Motee, the latter being behind a screen. She had lived with him as a concubine before.

This evidence was attempted to be opposed, as to the nature and effect of such a marriage, by two witnesses, Sikhs, one of whom said, that when a Sikh marries a woman there is a certain custom, viz. the bridegroom is mounted on a horse. But he admitted there was also a ceremony of *Kharat* and *Anand;* that when a Sikh wishes to take a woman to himself as a concubine, and brings her to his house for that purpose, he is discarded by the community of the Sikhs, and kept aloof from them for about a month, and until he invites them to congregate together for the purpose of the *Anand* being recited, which they comply with; and the *Kharat* ceremony is performed, and the *Anand* is recited, and such a woman is reckoned inferior to the woman married by the form called *Beeah;* but afterwards she does receive the appellation of wife from some, and of kept-woman from others. That he could not say whether a child by such a marriage would inherit, but that the Pandits could answer that.

The other witness said that he was acquainted with the marriage ceremony among the Sikhs. That when a Sikh took a woman into his keeping the ceremonies of *Kharat* and *Anand* took place. *Kharat* is an offering to the deity. When these ceremonies took place, the woman is received into the house, and on that occasion four or five persons are assembled[1]: and until the ceremonies are performed, neither the man nor the woman are received into the Sikh community. Afterwards she is considered as inferior to the woman married by the *Beeah* form; and the children by such concubine are entitled to some share of the father's property, which the Pandits can tell.

The Court, confirming the evidence of the marriage, and the right of the son to inherit in the proportion stated by the Pandits with respect to the illegitimate son of a Súdra; the Sikhs not admitting in strictness of Cast, and this being an inferior species of marriage by their law; and the Pandits admitting the law of marriage, as by Sikhs here,

[1] There were more in this instance.

though not known to the Hindús as such, by *Anand;* gave judgment for the plaintiff for only two-thirds of the property.[1]

No. XXXII.

GOOROOPERSAUD BOSE

versus

HABBERLY.

31st March 1815.

ASSUMPSIT on a promissory note, dated the 21st December 1813, drawn by the defendant for Rs. 1700, payable at a then future day, passed before action brought, to the plaintiff or order, at twelve per cent.

It appeared that the consideration of the note was government paper of the nominal value of Rs. 1700, but which was then at a discount in the market of Rs. 7 . 3 annas per cent., and the plaintiff told the defendant at the time that he was to pay in Company's paper.

The plaintiff was a Hindú residing in Calcutta. The defendant was a British-born subject.

The *Advocate General* objected that the note was usurious, for the Statute 13th Geo. III. c. 63. s. 30. prohibits any of the subjects of his Majesty in the East Indies from taking more than twelve per cent.; and though the Statute 21st Geo. III. c. 70. s. 17. may be relied on to shew that the contracts of Hindús are said to be governed by their own laws, and therefore that the plaintiff would not be within the English law of usury, yet even Hindús in the Mofussil are prohibited from taking more than twelve per cent.; and though that regulation should not bind Hindús in Calcutta, yet it is now against conscience, and oppressive in them, to reserve more; and the Supreme Court have always exercised an equitable jurisdiction in that respect over their contracts, when sought to be enforced by its process, especially in an equitable action: and at all events the Court will not suffer him to recover the whole

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[1] Note by Sir E. H. EAST—"This Cast being not legally noticed among the Sikhs, exists by reputation. I am not clear that upon the evidence, though slight, of the slave-mother being a Khythy, the son ought not to have had a full share; for the Pandits seemed to consider their Cast as still subsisting, or at least dormant. But when it was first suggested the defendant's counsel seemed satisfied."

sum, when it appears that the consideration was *minus* Rs. 7 . 3 annas per cent.

The Court had no doubt in giving judgment for the plaintiff for the principal sum in the note, *minus* the Rs. 7 . 3 annas per cent.

East, C. J., doubted as to the interest, whether, as twelve per cent. was reserved by the instrument, which it was admitted was good at law, the Court could give less than that interest on the sum really advanced; but as Burroughs, J., said that the Court had been in the constant habit of marking their disapprobation of usurious and oppressive contracts, by cutting down the interest, and sometimes even by denying it altogether; and as he proposed giving only ten per cent. in this case (the interest of the Court), which was not objected to by the plaintiff; judgment was given accordingly.[1]

No. XXXIII.

KISSENCHUNDER CHUND

versus

MUNNEE RAUR.

31*st March* 1815.

In an action on the case to recover Rs. 3,525, the purchase-money agreed by the defendant to be paid for the sale of three *Cottahs* of ground, conveyed by the plaintiff to the defendant, notice was given by the plaintiff to the defendant to produce the conveyance, and the defendant accordingly did produce it; but as there were subscribing witnesses, it was contended on his behalf that it must be proved by one of them.

But the Court considering that the defendant claimed an interest under it, held that it need not be so proved.

The plaintiff was afterwards nonsuited on the merits, it appearing that the money had been by his direction paid into the hands of a third person for the plaintiff and some others who had also an interest in the ground sold, and that that third person had been ready at all times to pay the plaintiff his own share.

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[1] Note by Sir E. H. East—"Since this case, Royds, J., says that he agrees that the interest reserved by the instrument, where the contract is not illegal, is the proper interest to allow."

No. XXXIV.

DOE DEM. BISSONAUT DUTT

versus

DOORGAPERSAUD DAY AND SIBCHUNDER DAY.

4th July 1815.

THIS case was tried in the third term, and stood over for the consideration of the Court upon the point of law till the fourth term, 1815, when the judgment of the Court was delivered by

EAST, C. J.—This was an ejectment for some premises containing, altogether, five *Cottahs* and fifteen *Chittacks*, with a dwelling-house, at Arcooly in Calcutta, of which Neelmoney Day, who died between nineteen and twenty years ago, was the patrimonial owner. It appeared by the evidence of one of the family that Neelmoney, for the last two or three years of his life, had been insane, and incapable of work, and that his wife was obliged to dispose of all his personal property in support of him and his family during his malady. At his death he left his widow Obhiah and three infant children, two sons, and an unmarried daughter. Those sons are the present defendants. At his death there was nothing left for the subsistence of his family but the property in question, and another small piece of ground, containing five *Cottahs* and a-half, which he had purchased a short time before his derangement.

The present lessor of the plaintiff claims under a deed of purchase, in reality from the widow, but nominally from her and her eldest son, both being parties to the deed, dated 15 Agrahan 1203 B. S., nearly twenty years ago, for the price of Rs. 218. It is not disputed that the price was fair at the time; and it appears to have been an open and avowed transaction; for Juggernaut, one of the subscribing witnesses, whose handwriting (he having been dead about five or six years) was proved by his own brother, in whose presence it was written, was at that time the head of the family, and there were several other relations present at the time. But it was also admitted that, at that time, Doorgapersaud, the eldest of the two infant sons, and who was a nominal party to the deed, was only seven or eight years of age.

The right, therefore, if any, of the widow to dispose of this property arose, and was put upon the ground of necessity, for the support and

subsistence of herself and her children. This formed the first and principal point which was made, and on which the opinion of the Pandits was taken as follows.

Q. to Pandits—1. Can a Hindú widow, having infant sons, sell the property of those sons to a stranger under any circumstances of want?

A. She may, to preserve the child from want, and that without consulting the rest of the family.

Q. 2. By what authority?

A. The Dáya Tatwa, the Dáyabhága, and the Víváda Chintámaní.

Q. 3. If there be a widow and brother of the father's side, and infant children, who is to manage for the family, whether divided or undivided?

A. If the family were undivided, the uncle of the children has the management. If divided, the widow has it; but in cases of emergency she will consult the relations of her husband.

Q. 4. Suppose she sold the property without consulting those relations, would the sale be binding?

A. It is necessary for her to consult the relations; but if they refuse, then she may sell, without their consent, as much as is necessary for the purpose. But she can, in cases of emergency, sell without. Those cases of emergency are, the subsistence of a child, the portion of a daughter, and a *shrád.*

Q. 5. If the widow have the means of subsistence from the support of the family, can she then sell the property?

A. Not so, if she have support.

In addition to these opinions of our own Pandits, we desired this case to stand over, in order to learn what the opinion of other Pandits might be, as I had been informed that the same question was then actually pending before the Mofussil Court of Appeal; and that Mr. WATSON, the Judge, had desired the opinion of the Mofussil Pandits to be taken upon the points: and I have been since informed, that, in the course of our last vacation, those opinions, having been taken, were in conformity to the opinion of our own Pandits; and that judgment was given accordingly by the Court of Appeal in favour of the widow's right to sell in cases of necessity.

In truth, it seems that such a power is founded in necessity and good sense, in a country where there is no public provision for the poor; for otherwise it might happen that a child's life might be sacrificed for the sake of preserving his property.

The only question, therefore, which remains, is, whether the necessity, from which the power arises, did in fact exist in this case.

As to this, a relation of the deceased father proved, on the part of the plaintiff, that the father was insane for two or three years before his death; that his wife was obliged to dispose of all his personal property during such his insanity, for the support of himself and family; that there was nothing left at his death but the real property; that if the ground had been let it would only have brought in six rupees per *cottah* a year, but that it was occupied by the family themselves; that they had nothing else to subsist on, or to clothe themselves with; that before the sale she did consult Juggernaut, the head of the family, who was a subscribing witness to the deed of sale; and that eight months after the ground had been sold, the widow married off the daughter.

The only way that this evidence was met on the part of the defendants was, by proving that, after the husband's death, the widow, who had an elder daughter married in the father's lifetime, used to go to her house, and had victuals occasionally given her, and this frequently, but she never staid the night; that the elder of the infant sons, who had staid at the married sister's for two years previous to the father's death, after he became insane, continued to reside there afterwards; and that the younger son, about a month after the father's death, also went to reside at his sister's; but both the sons were occasionally at their mother's. That the mother herself used sometimes to receive a rupee, sometimes half a rupee, from another of the relations; and that they were all in great distress. This evidence rather tended to confirm than to impeach the case of necessity made by the plaintiff.

In all cases the law must have a reasonable construction to forward the object of it. It cannot, therefore, be necessary, to authorise a sale of the infant's property, that the family should be in absolute and urgent want of the necessaries of life at the very moment; or sufficient to take away the power, that they are subsisting at the time upon the charitable donations of their friends and relations, who may at any moment with-

draw their help from them. Land is not to be sold at a moment's warning; but if the family have no certain resource for the future, and no actual means of providing for themselves the decent necessaries of life according to their condition, and no regular competent allowance from the family, but only mere casual charity, which was the state and condition of this family, this constitutes a reasonable necessity to warrant the sale of the property.

On these grounds we think that the purchase was well made, and that there should be judgment for the lessor of the plaintiff, who had been in possession under the purchase deed for nearly nineteen years before he was lately ousted by a judgment in ejectment snapped against him.

Judgment for the plaintiff.

No. XXXV.

WOODCOCK
versus
THE SHIP ADMIRAL DRURY.

14*th July* 1815.

THE ship was libelled for repairs on hypothecation bond.

The *Advocate General* intervened on behalf of the Company, and claimed a priority for certain port charges, Rs. 160, and Rs. 12 . 8 annas, which two claims were allowed. He referred to the Statute 53d Geo. III. c. 155. s. 98, 99, 100. 24.; and 54th Geo. III. c. 105.; and a Regulation of Police, dated 16th July 1801, laying a duty of 1 anna per ton.

The claim was admitted for Rs. 172 . 8 annas.

No. XXXVI.

DOE DEM. ARRATOON GASPAR
versus
PADDOLOCHUM DOSS.

9*th November* 1815.

THIS case has been already reported. See *supra*, No. XIX.

No. XXXVII.

MUDDENMOHUN SEIN

versus

READ, EXECUTOR OF FOSTER.

11*th November* 1815.

FOSTER died in the vacation preceding the trial; and after his death, and during the vacation, the plaintiff obtained a Judge's order for entering up judgment on a warrant of attorney dated the 23d March 1813.

Compton now moved to set aside the judgment on this ground, and upon another ground touching the construction of the warrant and defeazance.

The Court were clear upon the cases and practice against the first objection; and on the last they granted a rule *nisi*, which was afterwards discharged on the merits.

No. XXXVIII.

IN THE CASE OF A TESTACY AT CHANDERNAGORE.

14*th November* 1815.

Fergusson moved to recall letters of administration, which had been granted to the Registrar of this Court, of the effects of a Frenchman within Calcutta.

The Frenchman was born and domiciled at Chandernagore, and died there, leaving personal property, and also two bonds in Chandernagore, which had been executed to him by inhabitants at Calcutta. On his death, without personal representatives on the spot, Monsieur Richemonde, the Greffier of the French Court at Chandernagore, made an inventory of his effects there, and appointed curators to take care of the property, and to execute the will of the deceased; and it appeared by the Greffier's affidavit, that, by the French law, the curators, in the absence of the heir and representatives of a deceased Frenchman, are entitled to take possession both of his real and personal property, and to account.

In the meantime certain creditors of the Frenchman in Calcutta had interposed, and required the Registrar to take out letters of administration, in order to secure the bond debts of the testator.

But the Court, after giving a rule to shew cause, which was to be served upon the parties interested, and upon the Registrar, and no cause being afterwards shewn why the general law should not prevail, which gives the administration to the jurisdiction wherein the owner dies to give title to his representatives, made the rule absolute for recalling the letters of administration.

No. XXXIX.

RAMJOY POROMANICK
versus
LEWIS GOTTING AND MARIANA GOTTING.

17*th November* 1815.

DEBT on a joint bond. Plea *non est factum* by the defendant Mariana Gotting.

It appeared that the bond was given for goods furnished to these two defendants, who were carrying on trade as partners; but it also appeared clearly that Mariana was a married woman, whose husband was living at *A B*; but being a seafaring man, he was, in fact, at sea at the time of the bond given; and permitted his wife to be a trader, he not interfering in the business, and she choosing to live with the other defendant in the absence of her husband, had dropped her own, and taken the other defendant's name. The husband had returned from his voyage after the bond given.

The Court, as the objection was on the merits, gave judgment at the trial for the plaintiff to recover, with leave to the defendant to move to enter a nonsuit, and with a view to a compromise, which was recommended; but no such compromise taking place, the defendant moved afterwards, in the next term, to enter the nonsuit, which rule was made absolute, but without any costs of suit.

No. XL.

DOE DEM. KORAH SHUNKO TAKOOR
versus
BEBEE MUNNEE.

23*d November* 1815.

THIS case has been already reported. See *supra*, No. XX.

No. XLI.

GOBIND DOSS AND BREJOOBOOBUN DOSS

versus

PARBUTTYCHURN BOSE, HIRRALOLL BOSE, MUNDEN GOPAUL BOSE, AND RAMGOPAUL BOSE, SONS AND LEGAL REPRESENTATIVES OF KISTNOMOHUN BOSE, DECEASED.

26th January 1816.

THIS case, after the trial, stood over for a few days for the consideration of the Court upon the matter of law; after which judgment was delivered by

EAST, C. J.—This was an action of assumpsit upon the money counts, and for interest, to recover the balance of an account due from the deceased, amounting, in January 1814, to S. Rs. 10,340, with interest reserved at 12 per cent. from that time. The defendants pleaded no assets come to their hands of the estate of the deceased, *ultra* Rs. 400, which they offer to pay.

The plaintiffs established their case by proving an account signed by Kistnomohun Bose, on the 28th January 1814, at Patna, by which he acknowledged S. Rs. 10,340. 5 annas to be due by him to the plaintiffs, which he promised to pay and remit, with 12 per cent. interest, in two months after he got to Calcutta, having at that time embarked in the boat which was to convey him direct to Calcutta.

The first item in this account on the debtor side against Kistnomohun Bose is of the 14th December 1813, which states a balance then due from him of S. Rs. 386. 12 annas. The next item of debit is one of S. Rs. 15,000, which is on the 15th December; and on the 28th of January 1814 is the last item of the account, leaving the balance as before mentioned.

Kistnomohun died about a year ago.

In order to prove assets beyond the Rs. 400 admitted, he was proved to have been in possession, some short time before his death, of two houses: one of these was patrimonial property, of which it turned out, in the sequel, that he was only entitled to one-fourth. A deed of sale of this house, dated the 9th November 1813, was produced; and the subscribing witness to it proved that, before the conveyance, the house had been partitioned off into four

several parts, in one of which Kistnomohun lived, and in another lived Juggochunder, the vendee, who was Kistnomohun's nephew, and also entitled to one-fourth in his own right; but that after the sale Juggochunder possessed the whole. The deed of sale was from Kistnomohun to Juggochunder of one-fourth of the house and land, consisting altogether of five *Bíghás* and nine *Cottahs*, for the price of Rs. 3001.

This sale, it appears, took place upwards of a month before the debt of the plaintiffs accrued, and, according to the evidence of the subscribing witnesses, the change of possession immediately followed the deed, which was nearly two months before Kistnomohun's death, which took place on the 22d Magha 1221 (3d Feb. 1814).

We do not find that this evidence is encountered, on the part of the plaintiffs, by any evidence of fraud, unless fraud could be inferred from the answer of Trelochun Ghose, when he was asked as to the quantity of land attached to the old house, and the value of the property, who said that there were five or six *Bíghás* belonging to it, and that the value of the whole was about Rs. 20,000; but he gave no grounds for this calculation, which appeared to rest on a loose opinion, founded also in part upon an overcalculation of the quantity, stated in the deed itself as five *Bíghás* nine *Cottahs*.

The only question, therefore, which could arise on this part of the case would be, whether it was incumbent on the defendants to shew, not only that the property was out of them by the conveyance before the debt of the plaintiffs accrued, but also that the consideration, admitted by that conveyance to have been paid by the vendee, was actually paid by him to their ancestor, in order to prevent their being saddled with the amount, as well as with the costs, as so much assets fixed in their hands; though it was not proved to have been ever in their possession, and though by law they could not have recovered the possession from the vendee, against the conveyance, though voluntary, of their ancestor. This, I think, cannot be contended for.

The other property, namely, a new house, consisting, as it appears, of a dwelling-house and three *Bíghás* seventeen *Cottahs* of ground, is also charged by the plaintiffs to have been assets by descent in the defendant's hands. The facts of this vary in some respects from those relating to the patrimonial property. The new house was first con-

veyed by deeds of lease and release for securing a mortgage, dated on the 17th and 18th Nov. 1813, to certain mortgagees, out of whose possession the deeds were produced in Court. The mortgage money thereby secured, or at least professed to be secured, was S. Rs. 6237. This was some few days short of a month before the plaintiff's debt was contracted; the mortgagor continuing in possession till after the time when the plaintiff's debt was contracted. The latter circumstance, however, if the mortgage were for a valuable consideration, would not affect the question, the property being land, and the possession consistent with the deed. The witness, however, to the deed, and to the receipt of the money endorsed thereon, though he proves the time of the execution, says that he has no recollection whether the money was actually paid in his presence or not. If a *bonâ fide* consideration were paid for that mortgage conveyance, it is to be lamented that the defendants, who knew of the deeds, and subpœnaed the mortgagee to produce them, had not also given satisfactory evidence of the consideration, which might have spared another action.

But it appears, further, that on the 21st of Magha 1221 (2d Feb. 1814) the mortgagee, not satisfied with his security, took an absolute bill of sale of the premises, without, as it seems, any additional consideration paid for the other land, other than the interest which had accrued, and certain charges, probably of the conveyance, making, with the principal mortgage money, S. Rs. 7153; and this security was certainly taken after the plaintiff's debt had accrued. If, therefore, the equity of redemption were worth any thing, and no consideration were paid for it, even though a valuable consideration was given, as expressed, for the mortgage security, the absolute conveyance would, in that respect, be voluntary, and void as against creditors. But this is a question which would arise as between the grantee and the creditors of the grantor, and would depend on the fair valuation of the premises; concerning which, as the evidence stands, there seems very sufficient ground for further inquiry on the part of the creditors, more particularly as it is coupled with the fact, that the bill of sale was executed by the deceased when he was considered in a dangerous state, and the very day before his death. At present it is not necessary to enter more into that question, because our opinion turns upon another view of the case.

It appears that as the debtor was then lying at the point of death, (and might be considered as incapable of delivering up the possession at the very instant,) there is an objection on that account. The debtor, in fact, was carried out of the house not long after, and died at the side of the river, but his family continued in the house; and the subsequent continuance in possession of the family is accounted for by their having attorned as tenants to the vendees, and by proof of an engagement in writing by Parbuttychurn Bose (eldest son), made fifteen days after the father's death, (which, with reference to the Hindú customs, is a reasonable time,) to pay rent, though the subscribing witness could not tell whether rent had in fact been subsequently paid. This, we think, is sufficient to convey the title to the realty out of the vendor to the vendees (except as against creditors); for it is sufficient that possession of land accompanies and follows the conveyance, and the circumstances of the case explain why the possession was not delivered over at the very time of the execution.

There being no doubt raised as to the actual execution of these several instruments at the time when they purport to have been executed, the question is reduced to a mere question of law, in which it becomes necessary to consider the persons now before the Court: these are, not the creditors of the grantor, and the grantees, but those creditors suing the representatives of the grantor, on whom they allege that the property has descended by act of law. But it is clear, by all the authorities, that the grant is good as between the grantor and grantee, though void as against creditors. It therefore follows necessarily that the title must be out of the representatives of the grantor, because vested in the grantee, who is entitled to hold as against them, and as against all the world but those creditors.

The authorities cited and commented upon were 3 Bac. Abr. 314; Yelv. 179; Cro. Eliz. 810; *Edwards* v. *Harben*, 2 Term Rep. 587.

The same difficulty would have occurred when devised estates were subjected to the debts of the testator; and the Stat. 3d W. and M. c. 14. gave the remedy therefore against both the heir and the devisee.

Here, then, the only course where no such joint remedy is given, is to take judgments for the assets confessed, and judgment for assets *quando acciderint;* and then to bring ejectment for the realty in

question, or a bill for the equity of redemption, which may then be recovered if the deed of grant be invalid against creditors accordingly.

Judgment of assets, &c.

No. XLII.

JOHN SUKIES
versus
PETER SUKIES.

28th January 1816.

MARIA THOROSE GREGORY married Mary Pereira, and a settlement was made on the issue of the marriage, who were, Gregory Thorose and Merma Thorose. The latter married Khalistan Morat Khan, and died leaving a daughter, Merma Thorose's portion never having been reduced into possession by Khalistan Morat Khan, her husband. But the estate was in equity, and the fund in the hands of the *Accountant General* under a decree in this cause.

Khalistan Morat Khan took out letters of administration to his wife, Merma Thorose; and having fallen into difficulties, was sued by his creditors, and a writ of sequestration issued against his effects.

The application to the Court was two-fold;

1st. By the creditors of Khalistan Morat Khan, for liberty to attach the fund in the *Accountant General's* hands, which was the share originally of Merma Thorose; offering to take it, subject to such claim as the Court might think the daughter of the marriage entitled to under the settlement, if any; but relying upon the husband of Merma Thorose's legal title under the letters of administration, as well as his equitable title, to a share of the settled money belonging to his wife.

2dly. Khalistan, the husband, the administrator, joined with his daughter to petition that the whole might be settled on her, he waiving all claim thereto.

Strettell, A. G., on behalf of the creditors, stood on the legal right of the husband, administrator, to the whole fund; but admitted that whatever was the equity of the daughter against her father, was her equity against his creditors; and therefore objected to the application of the father and his daughter for the whole fund.

Fergusson, for the father and daughter, said, that as the former had

never reduced his wife's fund into possession, it stood in equity as her sole property; and as the only person who could claim in equity against the issue was the father, and as he not only waived his equitable claim, but joined in the application of his daughter, she was entitled to the whole. If no creditors of the father had intervened, the application would have been of course, he joining in it. The circumstance of intervening creditors of his, who could not touch the fund without the consent of the Court, ought not to prejudice the daughter's right in equity.

He contended that the doctrine that the wife's equity survived to her daughter was established in *Murray* v. *Lord Elibank*, and *Lady Elibank* v. *Montalieu*, 5 Ves. 737; 10 Ves. 84; 13 Ves. 1; 14 Ves. 496; and *Grosvenor* v. *Lane*, 2 Atk. 180.

Strettell, A. G., in answer, denied that the husband could abandon his rights as against his creditors. His consent to abandon his claim beyond the equity of the daughter against him would be voluntary, and without consideration as against creditors; and as it would be bad at law, equity would not decree it. The consideration is only commensurate with the equity. He cited Prec. in Chan. 22; Ambl. 121; 1 Atk. 170; 2 Atk. 518; Roberts on Fraudulent Convey. 278—285 cites 1 P. Wms. 459; 3 Ves. jun. 506.

The Court, upon consideration, were of opinion that the creditors had a claim on the fund; but in order to save the expense of a reference to the Master to hear proposals from the parties, and report, the fund being small, an order was afterwards made, by consent, that half the fund should be given to the creditors, and half be settled on the daughter and her children.

No. XLIII.

J. SUKIES
versus
P. SUKIES.

28th January 1816.

THE *Advocate General* moved in the same case that the interest of a sum of Rs. 8000 should be paid over to certain persons, who were

admitted to be entitled under the will after mentioned, if the trust were out of the way *pro tanto.*

The will was thus—"I leave Rs. 8000 for the establishment of a school of children of the Armenian nation in Calcutta, &c. As to Rs. 8000 they (trustees) are bound to lodge it in the Company's treasury at interest, and the interest to be carried to the credit of my estate annually, until God's mercy shall extend, &c." (*i. e.* to the people of his nation in Calcutta, to form such an establishment) "when such establishment takes place, and Rs. 35,000 is collected, and on a solid basis put into the Company's treasury for ever, by the approbation of our nation in general, &c. This amount is by no means to be appropriated to any other purpose or use, but must for ever remain at interest, &c. After the institution for a school is firmly established, and managers appointed, my executors and theirs can give and pay the above bequeathed sum of Rs. 8000 to the managers and superintendants appointed by general consent of the nation, and obtain a receipt. For this occasion my heirs and executors shall inquire, &c., and appropriate to this occasion," &c.

No further sum had been subscribed for the purpose specified in the will; but as the application was not for the principal, which had been bequeathed little short of twenty years before, and as he directed that in the mean time the interest should be carried to the credit of his estate annually, until, &c.,

The Court, no opposition being made to this part of the motion, ordered accordingly.

No. XLIV.

TARRAMONEY DOSSEE, SURVIVING WIDOW OF KISTENCAUNT SEIN

versus

KISTNOGOVIND SEIN.

28th January, 1816.

THIS was a bill for discovery and relief in various matters relating to lands, &c., in the Mofussil; and for an injunction to the defendant not to proceed in a certain action of ejectment which he had brought

against her in the Supreme Court, for real property in Calcutta, which the defendant claimed as heir, &c., to Kistencaunt Sein, &c., and for an account and the personal estate, &c., and to be let into possession of the landed property in the Mofussil, and to account for the rents and profits, and to deliver up a certain instrument to be cancelled, obtained by fraud, &c. The bill alleged that the defendant was subject to the jurisdiction of the Court in this suit, by reason of his having commenced and prosecuted the said action of ejectment on the plea side of the Court, in order to establish his title as the alleged heir of the said Kistencaunt Sein, and as the alleged surviving joint owner of the estate and property before mentioned; and that the said action at law respects the same subject matter as that touching which your oratrix seeks for relief by this her bill, and that the same points in question are involved in the said action, and in the present suit, and depend upon the issue thereof respectively.

The defendant, protesting against the truth of the facts stated in the bill, and to all discoveries and relief sought by it, other than and except such parts of it as seek a discovery of the members and state of the family of Kistencaunt Sein, and of the defendant in the lifetime of Kistencaunt Sein, and at his death; and of and concerning the proceedings in this Court in the said bill mentioned regarding the lunacy of the said Kistencaunt Sein; and also other than and except such parts of the said bill as such discovery and relief concerning the Bengal instrument alleged to be executed and delivered by the complainant to the defendant, &c.; and of and concerning the action of ejectment in the said bill alleged to have been commenced by the defendant in this Court, on the plea side, against the complainant, for recovering possession of the dwelling-house and premises in Calcutta, &c.; and also except such part of the bill as seeks a discovery concerning an affidavit sworn by defendant before a Judge of the Court, &c., in the matter of the lunacy of Kistencaunt Sein. For plea the defendant says, that he, the defendant, is a Hindú native of India, and at the time of filing the complainant's bill of complaint against him was not, and has not at any time since hitherto, and is not now, an inhabitant of the town of Calcutta, or in any manner subject to the jurisdiction of this Court; and that he, defendant, at the

time of filing the said bill, was, and from that time hitherto hath been, and is now, an inhabitant of Berhampore, in the province of Bengal, without the town of Calcutta, all which he avers to be true, and is ready to prove as this Court shall award: and thereupon this defendant doth plead the same in abatement to so much and such parts of the said bill as aforesaid, and prays judgment if the Court will or ought to have further cognizance of so much and such parts of the said bill hereby pleaded unto, and whether the defendant shall make any answer to so much, &c.; and not waiving the said plea, the defendant proceeds to answer so much as he is advised is material or necessary for him to answer.

The *Advocate General* and *Compton*, in support of the plea to the jurisdiction, contended that the pendency of the ejectment brought by the defendant against the complainant, gave the Court no jurisdiction over his person further than the interest of that particular suit was concerned, and could give no jurisdiction in respect of lands in the Mofussil, either with respect to the possession of the lands themselves, or to the rents and profits accruing therefrom, and depending on the title of the same; nor with respect even to the personal estate, which of course was not included in the pending ejectment. As to the form of the plea, they cited a precedent in Harrison.

Fergusson and *East* contended that the plea was bad *in toto*, in not stating particularly to what parts of the bill it objected. That the precedent in Harrison was bad, and condemned by modern precedents. 3 Atk. 225; Mitford 232, 3; 2 Ves. 107, 8. That the complainant had a right to the discovery of the whole, because it depended on the same title. That such had been always the practice of the Court.

The *Advocate General*, in reply, admitted that the Court had jurisdiction by construction over the subject matter of the action in ejectment, but only so far as enabled it to do justice in that particular suit, and no further; for the land itself was out of its jurisdiction, concerning which much of the relief was prayed; and the Court had no jurisdiction over the defendant's person, he not being an inhabitant of Calcutta.

The Court overruled the plea for defect of form, but ordered it to stand for an answer, with liberty to the complainant to except; and that

further proceedings in the action of ejectment against the complainant by the defendant should be stayed till a full answer was given to the satisfaction of the Court, and that the costs of arguing the plea should be paid to the complainant.

They seemed to consider, though no express opinion was given, that the pending of the ejectment *ex necessitate* gave them a jurisdiction to inquire of all such matters within the defendant's knowledge as were necessary for the just decision of the action brought by the defendant, though not as to the other matters disconnected therewith in respect of lands out of their jurisdiction, the defendant not being personally liable as an inhabitant of Calcutta generally, but only *quoad* the suit brought by him, which presumed him to be personally present in Court. With respect to the form of the plea, the Court thought it bad upon several grounds:

1st. That not going to the whole bill, but only to the parts not excepted to, and which are afterwards answered, it is not sufficiently clear and precise, but at least it makes it necessary to compare the bill and answer paragraph by paragraph in order to discover what parts are objected to, and what are not so, and even then leaving it uncertain to what extent; for where a Court cannot give relief it may yet entertain a bill for a discovery in aid of the Court which can give relief, 1 Ves. 205; and a plea may be allowed in part and overruled in part, Coop. 230: and here all the real property depending on the same title, as well that included in the ejectment as that in the Mofussil, it is very difficult, if possible, to disentangle the discovery sought as to the one from the other. The modern and better opinion is, that the plea should particularly discriminate; Coop. Eq. Plead. 229. 231; 3 Atk. 70; Mosely, 40; 2 Ves. 107, 8.

2dly. A plea to the jurisdiction must point out some other jurisdiction, which this plea does not affect to do; Coop. 238, 239, 240; 1 Ves. 202, 3; 1 Dick. 129; Wyatt's Prac. Reg. 325; Finch, 451; 1 Ves. jun. 372; 1 Vern. 59; Mitford, 183.

3dly. It is questionable whether the matter of jurisdiction should be pleaded in *abatement* or in bar.

The subject matter being out of the jurisdiction is not necessarily an objection to it, but may be obviated by circumstances, such as residence

of the party within the jurisdiction; Cooper 161; as when the contract concerning it is to be executed by persons within the jurisdiction, as in the case of a mortgage of the island of Sark, or of property in the West Indies; Cooper 241, 242. 123. 161. It may be another question whether a *constructive* presence within the jurisdiction is sufficient.

No. XLV.

RAMDULOL SIRCAR, AND ANOTHER

versus

SREE MUTTY JOYMONEY DABEY.

Sittings after 1st Term, 1816.

THIS was an issue to try whether a certain paper-writing, addressed to the plaintiffs, was the will of Radacaunt Chatterjee. In the course of the trial a witness of the name of Issenchunder was called, on the part of the plaintiffs, to support the will; against whom it was objected that he was interested, because maintenance was devised to his wife by the will, and the husband was by law entitled to receive it.

Whereupon this question was put by the Court to the Pandits:—

Q. If a legacy be given to a married woman, has her husband any interest in it?

A. If the legacy be given to her by the relations of her husband, or by her own relations, it is *Stridhana*, and the husband has no right to it; but if given to her by a stranger, she cannot part with her interest in it without her husband's consent.

It was next objected that he himself took an interest under the will, as having the custody and care of certain real property for his son till he came of age.

But the Court overruled the objection, the party taking no beneficial interest, but only as a bare trustee; and they would have admitted the witness, but on another objection, a doubt occurring whether he might not have an interest in a possible event in the equity suit, out of which this issue was directed; the witness was withdrawn.

No. XLVI.

WOOMISCHUNDER PAUL CHOWDRY AND ANOTHER *versus* ISSERCHUNDER PAUL CHOWDRY AND OTHERS, AND JOYNARRAIN PAUL CHOWDRY, ONE OF THE SONS AND LEGAL PERSONAL REPRESENTATIVES OF PREMCHUNDER PAUL CHOWDRY, DECEASED.

Sittings after 1st Term, 1816.

THIS came on upon a bill of revivor, filed to bring in Joynarrain Paul Chowdry upon the death of his father, the original party to the suit; and the only question made was as to the jurisdiction, the bill charging Joynarrain as an inhabitant of Calcutta. The defendant by his plea denied that he was an inhabitant.

The facts were, that on the death of his father, Premchunder, the defendant Joynarrain came into Calcutta to the family house, where the joint trade of the family was carried on; that he gave directions to the servants and managers, who were living there, to carry on the trade as before; and in fact the trade was carried on in Calcutta as before, and he had a joint interest in the family house and in the trade, both which continued down to the present time; but in fact he did not reside in Calcutta, nor was there any evidence to shew that he had ever slept even within the city, but resided at his house in the country. This it was contended, by *Fergusson* and *Compton*, did not make him amenable to the jurisdiction as an inhabitant.

The Court, however, confirmed the jurisdiction, and overruled the plea, with costs.

Note by Sir E. H. EAST.—It was admitted on all hands that the constant practice of the Court, on which I relied in the opinion I delivered, had been, to consider a person carrying on a trade in Calcutta, and having a house of trade there, as an inhabitant, though not personally resident, but conducting his business by means of partners, agents, or servants: and it appeared to me reasonable so to consider it; for such a person acquires a credit in the town by means of his house of trade, and many of those who deal with the house carried on in his name must be unconscious whether he be dwelling in Calcutta or not.[1] It would therefore

[1] On the trial of the issue on a supplemental bill, filed to stop the trade and take the

be a fraud upon all the customers if they alone were to be responsible within the jurisdiction, when the party who received their money or goods in his shop might put forth a mere man of straw as his representative, to be answerable for the demands against him. The residence of a servant in his master's house is, for this purpose, to be considered as the residence of the master himself. The word inhabitant is to be construed according to the subject matter, as in the Statute of Bridges, Lord Coke tells us, it means all those who have property within the county liable to be assessed. It may be different in the case of corporations, where the inhabitant who is eligible to be a corporator must, from the nature of the personal services required of him, be personally resident; but here the subject matter, *civiliter* at least, does not require so strict a construction, and the reason of the thing seems against it. But, at all events, after so many cases decided in this Court upon the construction now put by the Judges following the judgments of their predecessors, it would be improper to put a different construction; but the party may appeal if so advised.

No. XLVII.

JUSHADAH RAUR

versus

JUGGERNAUT TAGORE.

12th February 1816.

THE facts of this case were these:—One Rampersaud Mahotty, a Hindú, was married to Heera Raur, above forty years ago, and died about thirty-two years ago, leaving Heera his widow, and two sons and a daughter him surviving, and certain landed and personal property. The daughter died in infancy, about twenty-nine years ago; Paunchoo, the younger of the two sons, having first married the complainant Jushadah, died, at the age of thirteen, in 1198 B. S., about twenty-two years ago, without issue; Bulram, the eldest son, also died about twelve

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account, including Gunganarrain (the younger brother of Joynarrain) as a party, who was an infant, and pleaded to the jurisdiction, on the ground that he was not an inhabitant of Calcutta, and proved that he never was in Calcutta, being only an infant of eight years old, the Court still held the party liable to the jurisdiction, his elder brother consenting. 2d Term 1820.

years ago, leaving neither widow nor issue; and, last of all, Heera Raur, the widow of Rampersaud, died in 1218 B. S. (A. D. 1813), at a very advanced age, having first made a will, by which she assumed to dispose of the whole property which had been possessed by her husband, or acquired by herself after his death out of the rents and profits of the family estate; and of part of which her devisee, the defendant, had possessed himself.

The complainant filed her bill for a discovery and account of the personalty, and also of the title-deeds and documents of the real estate, and for delivering up of the same, and also for delivering up of the supposed will to be cancelled.

She also alleged in her bill, that Bulram, the eldest son, had died before Paunchoo, her husband, but the fact appeared otherwise on the depositions. On the other hand, the defendant also set up that the property in question had been the self-acquired property of Heera Raur, the testatrix; and that Rampersaud was not her husband, but her adopted son, in whose name the conveyances were taken, and who, it was admitted, had died before her; but this defence was also falsified, and the facts appeared clearly to be as first stated.

Thereupon, after hearing *East* for the complainant, and *Strettell, A. G.* for the defendant, it became a question whether Heera Raur could dispose of the family property of her husband by will, either in part or in the entirety; on which the opinion of the Pandits was taken, and they delivered it to this purpose:—

On Rampersaud's death, the family property descended to his two sons, Bulram and Paunchoo, Heera Raur, the widow, being entitled to her maintenance.

On Paunchoo the younger son's death, his moiety of the realty went to the complainant, his widow, for her life, with remainder to his brother Bulram in fee.

On Bulram's death, without leaving a widow or issue, Heera Raur, his mother, became his heir, both of the realty and personalty; and on her death the realty, and so much of the personalty (it having devolved to her from her husband's property), as was not disposed of by her in her lifetime, goes to the King, and she cannot will it away to a stranger (which the defendant was).

A widow, they said, may, in her lifetime, *give* away personal property which had devolved to her from her husband; but she cannot *will* it away.

Upon this opinion delivered, the Court decreed that one moiety only of the real and personal property of Rampersaud the father, which moiety had descended to Paunchoo, his youngest son, the husband of the complainant, should belong to her (the other moiety being in the Crown); and that the will of Heera Raur, affecting to dispose of her husband's family property to the defendant, should be delivered up to be cancelled.

Note.—It was understood, that if the defendant, who was a stranger, and had, by fraudulent practices on the old woman, obtained the will, did not give up the whole to the complainant for her life, the Advocate General would file an information against him.

No. XLVIII.

BYCAUNTNAUT PAUL CHOWDRY
versus
COSSINAUT PAUL CHOWDRY.

19*th March* 1816.

THIS was an issue directed out of the equity side of the Court, in order to try whether a certain instrument, dated 10th Asárha 1214 B.S. was the will of Sumboochunder Paul Chowdry, the father of both the parties, by which he had varied the proportions of his estate bequeathed to them.

On the trial, a person named Cossinaut Dutt was called as a witness by the plaintiff to establish the will, to which witness a question was put upon cross examination, whether he was not afflicted with the leprosy at the time spoken of, and even at the time of his examination; it being asserted at the same time that the affliction of leprosy, by the Hindú law, incapacitated a witness for ever from giving testimony.

The Court thereupon first put a question to the Pandits, whether leprosy did discredit a witness by their law, or vilify him in any manner.

To which the Pandits answered—That no person could associate with a leper; that he was considered as afflicted by God with the dis-

order, that he might, by certain ceremonies, purify himself from the sin; but that he could not give evidence by their law under the disorder.

The Court did not consider themselves bound to reject a witness as incompetent on this account; but thought that, at any rate, it was sufficient to preclude the necessity of the witness giving an answer to the question put in order to vilify and debase himself in the opinion of his countrymen; and the witness was told that he was not bound to answer the question: but he did, notwithstanding, answer it in the negative *in toto.* Other witnesses were afterwards brought to contradict him.

No. XLIX.

MARCA ZORA, SURVIVOR OF STEPHEN CARRAPIT, *versus* MOSES CACHECARRAKY.

21st March 1816.

Strettell, A. G., moved, on behalf of Johannes Sarkies, a judgment creditor of the defendant, prior to the plaintiff's judgment in this case, that the Sheriff, who had levied Rs. 7272 of the defendant's property, under a writ of execution issued after judgment obtained in this cause, should pay over the same to Johannes Sarkies, on the ground of his priority as a judgment creditor over the plaintiff, who was a subsequent mortgagee and judgment creditor.

In England, he said, the party applying might have taken out his *elegit*, and brought ejectment upon it, to try the question; but here no *elegit* was ever issued, and therefore no remedy was left to him but this application.

A rule *nisi* having been granted, cause was shewn on Thursday the 28th of March, by

Fergusson for the plaintiff.

The dates of the several facts were admitted to be these:—

Judgment was obtained by Sarkies in his action against this defendant on the 25th of February 1803, on which he sued out a writ of execution of the same date, to which *nulla bona* was returned. On the 7th of March 1803 he sued out an *alias* writ of execution, to which no return was called for by him, or made by the Sheriff; but on the 29th of January 1816 (which was after the present plaintiff's writ had issued,

which was returned levied) Sarkies moved to quash his former *alias* writ, which was quashed, and then he issued a new *alias* writ on the 24th of February 1816, which was returnable on the 20th of March, and which was delivered to the Sheriff on the 24th of February, the day on which it issued, which was after the levy on the plaintiff's writ; the levy on the plaintiff's writ having been made on the 11th of January 1816.

Fergusson referred to the 15th clause of the letters patent, which gives the writ of execution to the Supreme Court in a comprehensive form; and he would not say whether the Court could issue a writ of *elegit*, or other writ than that given; it not being necessary to consider that question, as no such writ had in fact been issued. The writ of *elegit* was given, not at common law, but by the Statute of Westminster. It was that Statute which says that it shall bind a moiety of the lands. It is the writ, and not the judgment, which binds the land. Here, then, the party having sued out only the writ given by the Charter, which is the writ of *fieri facias*, that writ cannot bind the land. A leasehold, or terms of years, may indeed be taken under a *fieri facias;* but the land is not bound till it be actually taken in execution by the Sheriff, according to the priority of delivering the writ to the Sheriff. It binds only from the delivery of the writ, and not from the judgment. If Sarkies, having the prior judgment, had sued out his writ of *fieri facias*, and delivered it to the Sheriff prior to the plaintiff's delivery of his writ, then Sarkies would have been entitled to a preference, which he has now lost by his laches; for the plaintiff had levied before Sarkies delivered his writ to the Sheriff.

The *Advocate General*, in supporting his rule, admitted that he had not much confidence in his application, but it was material that the question should be settled. If the Court could issue an *elegit*, they would not suffer this party to be prejudiced by their not having adopted the practice of issuing such writs, and they would give them the same remedy in another form. Land, he argued, was liable to be seized for debts by the Charter, as well as goods; and if the judgment bound the land (which depended on whether the Court considered the writ as equivalent to an *elegit*) the debtor could not give a priority to another by a subsequent mortgage of the land.

The Court, without determining to what extent land was made the same as personal property by the Charter, had no doubt in deciding this rule; considering this merely as the case of two judgment creditors, one of whom, though his judgment was posterior in date to the other, had used better diligence, and, instead of sleeping upon his judgment, as the prior judgment creditor had done, had first delivered his writ of execution to the Sheriff, and got it executed before the other had stirred, after his first inoperative writ was returned *nulla bona.* And they considered that the Charter had given to the Court one comprehensive writ of execution against both lands and goods, and no other writ of execution than that could properly issue. It was not an *elegit,* nor was it, properly speaking, a writ of *fieri facias,* in the understanding of such a writ in England; for not only *lands* but *debts* were seizable under it. It was a writ *sui generis;* and the judgment creditor who first delivered and got it executed by the Sheriff was entitled to be preferred.

East, C. J., reserved his opinion how far lands were made assets generally in the hands of executors and administrators, which was touched upon in the argument, not being satisfied that the Charter had made them such generally, but only *sub modo* under a writ of execution issued by the Court for debts recovered by judgment.

Rule discharged.

No. L.

SIR WILLIAM BURROUGHS, Bart., (Junior Judge of the Court)
versus
CHISHOLM.[1]

2d April 1816.

This was an action against the surety upon an administration bond, which, by the 23d Section of the Charter is directed to be taken in the name of the Junior Justice of the Supreme Court.

This bond was taken in the penal sum of Rs. 140,000, being double the amount of the assets sworn to, and was conditioned to be void if

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[1] See *infra* No. LIX.

Robert Moore, the father of Ann Evans, and administrator of John Evans during the nonage of the said Ann, should truly administer, &c., and further should make a true and just account of his said administration.

Seven breaches were assigned. The 1st and 2d were, that Rs. 52,666. 10 annas, 8 pice had come to Moore's hands as administrator, yet that he had not accounted, and that he did not account for that sum.

To these two breaches the defendant by his plea denied that Moore had received the money at all, on which the first issue was taken.

The 3d breach assigned was, that he had inserted as a debit to the estate the sum of Rs. 1000. 5 annas, as having been paid to Watson and Co., creditors of the intestate, which in fact he had not paid; on which the second issue was taken.

The 4th, 5th, and 6th breaches were of a similar kind to the 3d; and issues were respectively taken thereon.

The 7th put in issue whether a balance of Rs. 7022. 17 annas was due to the administrator on the 14th of Sept. 1815 (the 15th of Sept. being the day on which he had delivered in his account, in which such a balance was claimed by him).

The facts appeared to be, that John Evans, having purchased a ticket in the Calcutta lottery, had promised Anne, the daughter of Robert Moore, the administrator, that if it came up a prize he would give her half of it. The ticket came up a prize of Rs. 100,000, and John Evans thought it was better to marry Anne Moore than to give her half of it; but on his marriage he entered into covenant with Moore, the father, and another person, to settle Rs. 50,000 upon her, which, in the settlement, was stated to be her money. John Evans afterwards lent Mr. J. Duckett Rs. 50,000 on mortgage, but in the mortgage-deed the money was reserved payable to himself; but Moore, the father, was one of the witnesses of the deed of mortgage, and a bond and warrant of attorney to confess judgment was given by Duckett as part of the same assurance.

John Evans died without issue, leaving Anne, his widow, under the age of 21, whereupon Moore, the father, on the 16th of Sept. 1814, took out letters of administration of his daughter. She had since come of age, and had married Mr. Dowling. But while the letters of admi-

nistration were still in force, Moore being in distressed circumstances, (his daughter then living with him before her second marriage), made a demand upon Duckett of the principal mortgage-money and interest, and threatened to sue him if it were not paid. The demand was made by Moore in his character of administrator; but Duckett had notice of Anne Evans' claims under the settlement, and upon her application, while she lived with her father, had paid her some small sums on account: which, upon the settlement of the account with Moore, in consequence of his demand, were agreed to be allowed to Duckett, and Duckett paid Moore the whole amount of principal and interest, and took his receipts at different times, in Moore's character as administrator, under legal advice.

The greater part of the money was paid to Moore before he delivered in his account to the Registrar on the 14th of Sept. 1815, but a small sum was actually paid afterwards, though security was given for it before.

The present was the first proceeding which had taken place under the provision of the Charter of which any knowledge was had; and the Court had much doubt as to the proper course of proceeding to be adopted in respect of the breaches assigned.

The Charter, after giving the condition of the bond to be entered into by the principal and sureties for the due administration of the estate, says, that "in case it shall be necessary to put the bond in suit, for the sake of obtaining the effect thereof for the benefit of such person or persons as shall appear to the Court to be principally interested therein, such person or persons from time to time paying all such costs as shall arise from the said suit, or any part thereof, such person or persons shall, by order of the Court, be allowed to sue the same, in the name of the said obligee, and the said bond shall not be sued in any other manner. And we do authorize and empower the said Court to order that the said bond shall be put in suit in the name of the said Junior Judge, or of his executor, whom we also authorize the said Court to name and appoint for that special purpose."

The *Advocate-General* had first contended, that though Moore had got the money into his hands as administrator, yet he could retain it as trustee under his daughter's marriage settlement; and he cited various

cases, 3 Burr. 1380; 2 Show. 403; 2 P. Williams, 299; and 12 Ves. 119. But

The Court had no doubt, under the circumstances, that this money was part of the general assets of the intestate's estate, whatever claim she might have in equity against the estate for it; and moreover it had been demanded by Moore as administrator, and he had acknowledged the receipt of it as such, and Evans himself had reserved it payable to himself, without notice of the settlement.

The next questions were of more importance and difficulty, as to the manner in which the judgment should be entered, and what should be done with the breaches assigned, and whether, and in what mode, relief could be given to Mrs. Ann Dowling, on whose application, with her now husband, the bond had been ordered to be put in suit.

The Court had no difficulty upon the trial in directing judgment to be entered for the penalty of the bond, which they considered as a security for the present and all future breaches which might be properly substantiated before them by the parties interested.

This is sufficiently established by the case of *Greenside* v. *Benson*, 3 Atk. 248; which was the very case of an administration bond: and the clause of the Charter referred to orders made from time to time by the Court on behalf of the parties interested in the security.

They had no difficulty, also, in finding the first issue (which included the 1st and 2d breach) for the plaintiff, and the 3d breach was also found for the plaintiff: the others were finally withdrawn by leave of the Court, and a *noli prosequi* afterwards entered on the record as to them. But the great difficulty of all was, whether the Court should proceed to find damages on the breaches assigned; and if so, to what extent the damages were to be found in this case upon the 1st and 2d breach, which regarded the interest of Mrs. Dowling.

After much consideration, the Court thought the case not within the statute of William as to the necessity of assessing damages upon the breaches; but that upon a breach of the bond found, the Court should give judgment for the penalty only, leaving it to the several parties aggrieved to establish their respective claims upon the estate by bill, *scire facias*, or summary application, as the case might be; on which

the Court, after ascertaining the amount, would order execution to issue *pro tanto*, to the extent, if necessary, of the penalty.

In the next October term, *Fergusson* having moved the Court, on behalf of Mrs. Dowling, to take the account of her claim,

The Court referred it to the Registrar to take the account, and report specially.

No. LI.

LUMSDAIN, RESIDUARY LEGATEE, AND OTHERS *versus* LUMSDAIN, EXECUTOR AND TRUSTEE OF ANNE EVANS.

8th April 1816.

THIS was a bill filed for an account of the rents and profits of the real estate come to the hands of the defendant, as trustee and executor of Anne Evans, and for the delivery up of the same to the residuary legatee.

The defendant, by his answer, did not deny that the estate came to his hands as executor and trustee; but set up a will of one John Matthews, which he had found amongst the papers of the deceased, by which he contended that the testatrix had only a life estate given to her in the premises, with remainder to her son, who died in her lifetime, &c.; and that therefore the heir-at-law of John Matthews (if any there were, whom he did not name) was entitled; and therefore he did not in fact render any account of the rents and profits.

To this exception was taken and allowed by the Court, who held, that it did not lie in the mouth of an executor or trustee, who had received the property from his testator, to dispute his title to it, and thereby appropriate it to his own use. That if he did not choose to embarrass himself with the property, he might relinquish, and even restore to the right owner that which he could not lawfully retain against him; but if he kept it himself he must account.

The testatrix had been in possession above forty years.

No. LII.

BURT AND OTHERS, INFANTS, BY WILLIAM BURT THEIR ELDEST BROTHER AND NEXT FRIEND, AND BANDUL BIBEE

versus

WOOD AND OTHERS, EXECUTORS OF DR. ADAM BURT, DECEASED;

AND ALSO CRUTTENDEN, COMMITTEE OF THE ESTATE OF WILLIAM BURT, A LUNATIC,

versus

THE SAME.

11*th April* 1816.

THIS came on upon a bill filed for carrying into effect the trusts of the will of the late Dr. Burt. Pending the first suit, William Burt became a lunatic, and the second bill was filed by his Committee.

Two wills were found amongst the papers of the deceased, one dated 9th of December 1810; and in a distinct envelope, not connected in any manner with the former, was found a will of later date, made in ——, on the 1st of January 1814, in which most of the bequests and legacies were repeated, but in different words, and with some variations; the most material of which variations was this:—He was actually indebted to Bandul, a Musulmán wóman, who had lived with him many years, and by whom he had all his children, parties to the bill, in a sum of Rs. 4500; and by his first will he directed a sum of Rs. 5000 to be laid out in satisfaction of this demand, the interest of which only she was to have for her life, and after her death the principal to go to their children. But in the second will he took no notice of the debt; but after providing for his children, as after-mentioned, he proceeded:

"Rupees 5000 to be invested in a house for Bandul, and Rupees 30 to be paid her monthly during her life."

The Court held,

1st. That the second will was a virtual revocation of the first. It made provision for the same persons, and, in general, to the same effect; and so far as it made a different provision, as in the instance mentioned, it revoked the first.

The provision made for the children, which immediately preceded the above-mentioned provision for Bandul, their mother, was this. After giving several specific legacies—

"All besides that I am worth shall go in equal shares to my six reputed natural-born children of Bandul. On the death of any of my natural children *intestate and without offspring*, the survivors of the same shall succeed to the property of the so deceased, in virtue of this my will."

Another question arose with respect to the eldest son, whether a sum of Rs. 8000, which had been ordered by Dr. Burt to be paid to that son in October and November 1811 by the Doctor's agents in Calcutta, and which was accordingly then paid to him, was to be taken as a loan or gift: if the latter, it would give that son double what the rest would receive under the will. But upon reading several letters from Dr. Burt to his agents, and their answers respecting this sum, the Court were clearly of opinion,

2dly, That the Rs. 8000 was intended as a gift by the father, and that the mode of making the advance as of a loan arose from the suggestions of the agent, as a method of securing his good behaviour, and which, after a short time, was disavowed by the father altogether.

The third point was, whether the bequest of the Rs. 5000 to Bandul, in manner before stated, gave her an absolute interest therein, or only for life; and the Court held that it was only for life. There were no words to shew any other intent. It was not given to her as *money*, or given to *her* at all; but it was a mere direction to his executors to lay out so much money *in a house* for her, that is, for her use. The money could not be otherwise laid out, and it was coupled in the same sentence with a monthly provision *during her life*, which latter words overruled the whole sentence; and after her death it would go to her children under the residuary clause, though that preceded it. He contemplated a benefit both to her and her children in this mode of providing for her.

4thly, Considering the bequest as made to her only for her life, it was still more clear that it could not be taken to be in satisfaction of the debt of Rs. 4500 due to her from Dr. Burt, since it was a less sum than that debt in value; and the children would probably have the use of the sum as well as herself, and the smallness of the monthly provision for keeping up a house of that value confirmed that construction. On this point 3 Ves. jun. 462 was cited.

5thly, It was considered what estate the children took under the words

of the will; on which point were cited, 3 Ves. 536, and 16 Ves. 136. The Court was now of opinion that the children took, in the first instance, respective estates for life, with a power of disposition by will, though they had no issue. That as either had offspring born, the interest became vested in the parent; but that if there were no offspring born, nor the party made a will, the interest in his share survived to the survivors, the last of whom only would take absolutely: whereupon the legal estate must continue in the executors till the respective interests or the interest of the survivor of all vested. The vesting of the interests in the cited cases turned upon this, that the child had a disposing power during his lifetime over his own share.

6thly, The Court held, that the executors should be allowed, in account, the maintenance they had expended upon the infant natural children from the death of the testator, it being taken out of a residue given to themselves in equal shares and with two contingencies.

And it was decreed accordingly.

No. LIII.

RAMJOY SEE
versus
TARRACHUND.

12th June 1816.

THIS was a case before EAST, C. J., at Chambers, in May and June 1816. Ramjoy See claimed from his uncle and aunt, as the persons last seised, the aunt having shortly before survived the uncle, whose patrimonial estate it was; and complained that the defendant, whom he charged to have originally held as a tenant under his uncle, now claimed the estate as his own.

The defendant insisted that he never held as tenant to the uncle or aunt, or to the petitioner, but to one Golaum Hussein Shah, from whom he purchased about nine years ago; and that fact would have been to be tried between these parties, but in the course of the examination it came out from the petitioner that his uncle and aunt had left an only daughter surviving them, who was married to a person of the name of Lubkissore, and who had a male child by him, which male child survived the mother from eight to fifteen days.

Wherefore the *Chief Justice* took the opinion of the Pandit upon the matter of law,

Whether, supposing, as the complainant averred, that this estate had been the property of his uncle, from whom he claimed as next male heir, on default of issue of his uncle, the property would be his or Lubkissore's?

The Pandit declared—1st, If there had been no issue of the uncle's daughter surviving its mother, the property, on the daughter's death, would have gone away from her husband, Lubkissore, to the complainant, as next male heir of the uncle; but,

2dly, As the daughter had male issue which survived her, the estate descended to such male issue, on whose death Lubkissore, the father, took, as heir-at-law to his son.

The petition was accordingly dismissed.

No. LIV.

SREE MUTTEE MUTTEE BERJESSORY DOSSEE
versus
RAMCONNY DUTT AND RAMPERSAUD DHUR.

26th July 1816.

THIS was a bill filed by the surviving eldest widow of Ramcaunt Sain, deceased, against the defendants, the one as the surviving executor and trustee under the will of her husband, the other as having, with the first, possessed himself of the property of the deceased to the amount of Rs. 16,000 in cash, and also jewels, &c., and of certain real estates; and the bill prayed an account of the personal estate, and of the rents and profits of the real estates, to the plaintiff, as the widow, heir, and legal representative of her deceased husband, and to pay and deliver over the same to her; and also to deliver up, in order to be cancelled, three several deeds of gift and a general release, obtained from the plaintiff by the defendants under circumstances of fraud and imposition set forth in the bill; the plaintiff offering to deliver up to the defendants a certain *Rafanámeh*, or instrument of settlement, executed by them to her (as a part of the same fraudulent transaction and imposition); and she also prayed to be let into possession of the several parcels of land mentioned in the several deeds of gift.

It appeared by the answer and depositions that Ramcaunt Sain died, possessed of personal and real property, on the 29th of October 1805, leaving two widows, the plaintiff his elder widow, and Alunko Dossee the younger, then about fourteen years old, and without leaving any issue. Two days before his death he made a will, to which he appointed the defendant Ramconny Dutt and Rambeshary Dutt his attornies, to collect his debts, rents, &c., and pay the same into his estate; and he thereby ordered them to pay Rs. 2000 to his elder wife (the plaintiff), and Rs. 2000 to his younger wife, and to pay for their maintenance. They were also directed to perform the worship of the deity, as the testator had done; and he willed that nobody should sell his estate. It was also admitted by the answer, and deposed, that, at the time when the deceased made his will, he declared to his attornies therein named that the will was made merely to guard against the youth and inexperience of Alunko Dossee his younger wife, and as a check upon her; and that after his death the defendants were to realize his estate, and deliver it over to the management of his elder wife, and that she should maintain the younger.

Both parties, though now with different views, agreed to the truth of this statement at the time it was made; but when it came to be read, an objection was started as to its legality, and the opinion of the Pandits was desired by both parties to be taken, which was accordingly done as after stated.

Several depositions were read, to shew that the defendants, after the death of Alunko Dossee the younger widow, which took place about four years previous to the institution of the suit, agreed in considering the plaintiff as the owner of the estate, and obtained from her, on that supposition, deeds of conveyance of it, after a pretended account made up by themselves, who were in the actual management of it. This settlement of accounts was made, it appears, in the course of the night of the 26th November 1811, when the deeds were executed, which had been previously prepared, and that only Rs. 1000 were then paid to her as the residue of the estate.

In this case the following questions were put to the Pandits, and answers given by them as follows:—

1. Q. If a Hindú die without leaving issue, but leaving two widows,

does his whole estate go to his widows for their lives? and on the death of one of them afterwards, does the whole survive to the other widow?

A. The whole estate does go to the two widows; and on the death of one, the whole goes to the survivor; and on the death of the survivor, it goes to the collateral heir of the husband, such as a brother, &c.

2. *Q.* Can a Hindú make a disposition of his property both verbally and in writing at the same time?

A. He may.

3. *Q.* If the writing and the parol disposition be contradictory one to the other, which is to prevail?[1]

A. The writing must prevail, as being the more certain evidence of the testator's disposition.

It was also insisted by the plaintiff's counsel that the attornies named in the will took no beneficial interest under the will, but in their respective character, and not merely as executors, but as trustees; and they cited cases to shew that during the continuance of the trust no conveyance obtained by them from their *cestui que trust* could be supported in equity; 9 Ves. 296 states the result of the cases to that time, and there were subsequent cases to the same effect in 13 Ves. and 14 Ves. Besides which they relied on the evidence of duress and of fraud.

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[1] *Quære* as to the propriety of asking the Pandits whether parol evidence could be given of a testamentary disposition, when it appeared that there was a written will? for it must tend to vary the writing, and either add to or diminish it, though it may not contradict it. The Court expressed this doubt at the time, but one of the parties wished to hear the opinion of the Pandits, and the other did not object. Vide what is said by the Vice-Chancellor in *Clowes* v. *Higginson*, 1 Ves. and B. 526: "The exclusion of parol evidence offered to explain, add to, or in some way to vary a written contract relative to land, stands upon two distinct grounds; not simply as being in direct opposition to the Statute of Frauds, but also upon the general rule of evidence independent of that Statute. The writing must speak for itself, and can receive no aid from extrinsic evidence of this more loose and unsatisfactory nature. That, which is the rule of Law, prevails equally in Courts of Equity; which admit no different rule of evidence on this subject, and thus far the rule is perfectly clear, rejecting parol evidence offered by the plaintiff to constitute, vary, or explain a contract in writing concerning land of which he seeks the specific performance in a Court of Equity."—Note by East, C. J.

The counsel for the defendant contended that they had a beneficial interest in the surplus, and that the specific legacies to the widows shewed that they were not intended to take more. But if not, then they relied on the plaintiff's taking under the parol evidence, and stood on her conveyance to them.

The Court had no doubt of the fraud in taking the conveyances, and decreed them to be given up to be cancelled.

They also decreed an account, considering the plaintiff as at all events entitled to the account.

Note by Sir E. H. East.—I went on the construction of the will, as shewing no interest in the executors other than as such, *i.e.* as managers of the estate, not for their own benefit. I guarded against relying on the parol evidence, considering that the plaintiff would take by law every thing for her life that was not bequeathed away to another, and that there was no such bequest away to another in this case.

The dedication to the deity is no disposition of the property; and many cases have determined that it is no objection to an heir-at-law taking an undisposed residue, though a specific legacy be given to him by the will. Vide per Wilson in *Harbergham* v. *Vincent*, 2 Ves. Jr. 225. "There is no other way to exclude an heir than by giving it to somebody else: therefore, if from the circumstance of part being given an inference could be raised that the testator meant the heir should have no more, yet even against that intention the heirs would take."

No. LV.

CHEW
versus
TUCKER.

Fourth Term, 1816.

Judgment of the Court delivered by East, C. J.

A rule for judgment as in case of a nonsuit having been regularly obtained in the last term, was discharged upon the plaintiff's peremptory undertaking to try his cause on the second day of this term. The plaintiff, however, never entered his cause for trial according to his

undertaking, nor was it even entered after the day, nor any motion made before proceeding had on the part of the defendant, to discharge the plaintiff's peremptory undertaking, and to postpone the trial, on the ground of absence of a material witness (as was afterwards alleged in excuse). But the defendant on the 2d November moved for judgment as in case of a nonsuit for the plaintiff's not having proceeded to trial pursuant to his peremptory undertaking, and such judgment was given accordingly.

A motion was afterwards made by *Macnaghten*, on the part of the plaintiff, for setting aside that judgment for irregularity, because no notice of the motion for judgment as in case of a nonsuit was given previously by the defendant to the plaintiff; which it was contended was necessary by the words of the Statute 14th Geo. II. c. 17., or rather by the 65th Rule on the plea side[1] of this Court, which follows the substantial words of the Statute, and upon the construction put upon those words by the Court of Common Pleas in *Gouch* v. *Pearson*, 1 H. Bl. 527, where that Court, on reference to the Statute, and to their own practice, held that such notice was necessary, even after a peremptory undertaking, as well as in the first instance.

On the contrary, it was contended by *Fergusson* for the defendant, that the Court of King's Bench, whose practice we were to follow, had considered the rule to shew cause why judgment should not be given as in case of a nonsuit, to be equivalent to the notice of motion required by the Statute in the first instance; and that no notice of any kind was necessary after a peremptory undertaking to try not complied with.

And upon looking into the Act of Parliament, and to the authorities, we are of opinion that the practice of the Court of King's Bench is at variance in this respect with the practice of the Common Pleas; and that the case in H. Blackstone's Reports turned, not upon a construction of the Act of Parliament merely (in which case it would have bound our decision), but with reference to the particular practice of that Court, which is let in by the words of the Statute; and Mr. Tidd, in stating the practice of the two Courts in this respect, in his last edition,

[1] 2 Sm. and Ry. 92. par. 12.

contrasts them, and points out the different course of each Court[1], and this difference is further apparent by referring to the forms of proceedings in his Appendix[2], and in Impey's Practice in the King's Bench and in the Common Pleas. And on reference to our practice we find that it has been in conformity with that of the King's Bench in the construction of our own Rule of Court founded on the Statute. The consequence is, that the rule for setting aside the judgment for irregularity must be discharged.

No. LVI.
COMBERBATCH
versus
KISTOPREAH DOSSEE.

9th November 1816.

THIS was an action for work and labour as an attorney, and on the common counts; which cause came on to be tried *ex parte.*

After putting in the roll of attornies to prove the plaintiff an attorney of the Court, and proving the defendant to live within the jurisdiction; the plaintiff's writer was called, who proved that five or seven days after the bill of costs had been taxed (which by the practice of this Court is done in every instance, whether required or not by the party), namely, on the 19th February last (the plaint being afterwards filed on the 19th March), he took the bill, with the Master's *allocatur* on it, and shewed and explained it to the defendant in the presence of her *Mukhtár*, and of her son, when she told them to go to Mr. Comberbatch's and pay the money. The *Mukhtár* of the defendant did accordingly go the next day, and after endeavouring, without effect, to get a part of the demand remitted, promised to pay the whole; but in fact the money was never paid, in consequence, as it was suggested, of the son and the *Mukhtár* having intercepted it for their own use, thus defrauding both the plaintiff and the defendant.

The Court, however, as the cause was *ex parte*, held themselves bound to advert to the 76th Rule on the plea side, which directs that no

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[1] See 1 Tidd, 495, and 2 Ditto, 779. 781, 782.

[2] See 3 Tidd, 205.

attorney do demand or receive the amount of his bill for business done in Court till taxed, &c., nor without delivering in his bill of costs to the party, &c. And as it turned out upon the evidence, that though the bill had been so delivered on the 19th February, and was left at the defendant's, yet that on the same day, a few hours afterwards, the plaintiff's clerk had applied again for it (it being the original, with the Master's *allocatur* on it), and received it back again, the Court held that the Rule of Court had not been complied with, for that delivering in meant a delivery to, and a vesting with, the party, so as to enable her to have full consideration of the items, and to take advice up to the period of the settlement; and here the defendant did not of her own accord return the bill, but merely did not dispute the return of it when demanded.

The plaintiff was nonsuited.

Note by Sir E. H. East.—A doubt was started whether a month's notice must not be given before the action could be brought; but it was decided that such a doubt was only referable to the Statute, which applies only to cases where the action is brought without taxation; and the month's notice is required, as the Statute expressly states, to enable the other party to apply to the Court, and have the bill taxed, undertaking, however, to pay the amount taxed, which, if not paid accordingly, may be compelled by attachment; yet a reasonable time ought to be allowed after the delivery even of the bill when taxed.

No. LVII.

WOOMISCHUNDER PAUL CHOWDRY AND ANOTHER, INFANTS, BY, &c.

versus

ISSERCHUNDER PAUL CHOWDRY AND JUGGILKISSORE BUNDOPADIAH, AND OTHERS, THE SONS, HEIRS, AND LEGAL PERSONAL REPRESENTATIVES OF PREMCHUNDER PAUL CHOWDRY, DECEASED.[1]

21st November 1816.

The original bill was filed against the defendants, or those whom they represented, on the 6th of April 1813, and an answer was filed

[1] See *supra*, No. XLVI.

with the schedule annexed of the joint estate, which appeared thereby to consist of a considerable property, in June 1813, amounting to about two lacs and a-half in cash and securities, stock in hand in trade Rs. 282,281, and above seven lacs of outstanding debts, against which was to be set debts and legacies due from the estate to the amount of about Rs. 136,235.

The bill was for an account and a partition on the part of the complainants, then infants, by their guardian; but the prayer for a partition was afterwards abandoned, and the complainants, on the 4th of February 1814, took a decree for an account only, and no charge had yet been filed before the Master on the decree to account: and now Woomischunder Paul Chowdry, who in the mean time had come of age, and whose share of the property was three-sixteenths, applied by motion for the payment to him, by Isserchunder and Juggilkissore, in whose hands the money recovered, belonging to the estate, was alleged to be, for Rs. 6000, which was stated to be within the amount of the share to which he was entitled.

Strettell, A. G., and *Lewin*, on a former day, obtained a rule to shew cause why this sum should not be paid over to Woomischunder, as his undisputed property, without the necessity of going into the account before the Master, which was now opposed by

Fergusson and *Compton* for the defendants, who objected to this proceeding *per saltum*, as without precedent. They referred to the will, which gave power to the eldest sons (salt merchants) to carry on the trade; and then, after assigning the different shares to the four sons, proceeded thus: "As to the estate which remains, exclusive of expenses and disbursements, should the two minor sons, when they become of age, not agree together, you will divide it according to the above allotment, and give it to the four brothers. In the meantime, should the four brothers ask for money for their own use, you will debit him who takes money, and give what is proper;" and they objected that the Court would not entertain this application, at least till request were made to the trustees, and a refusal by them to grant a proper sum. They referred to *Quarrell* v. *Beckford*, 14 Ves. 177, where a motion for payment of money into Court, not admitted to be due even upon the examination of the defendant, but appearing due by his schedule, according to the plaintiff's

calculation, was refused. But here, till the fourth son came of age, all was in the discretion of the trustees, though the Court might controul any abuse of such discretion by their decree, if called for.

In answer to this, *Owen* v. *Owen*, 1 Atk. 496, was referred to, as shewing, that nothing being actually vested in the four parties, they were not trustees.

The Court refused the application, and discharged the rule, there being no ground for thus proceeding *per saltum*, and referred the plaintiff to the ordinary course of proceeding under the decree to account.

No. LVIII.

MATHEWS
versus
HOWARD.

15*th January* 1817.

A *capias* had been issued in this cause against the defendant, an attorney of the Court, under which he was taken and released on bail in the vacation; and now

Fergusson moved to enter an *exoneretur* on the bail piece, on the ground of the defendant's privilege from arrest; and cited Tidd, 170; and also an instance in the Supreme Court on the 30th April 1813, where a *capias* had issued against Mr. Benjamin Saunders, an attorney of the Court, which was never executed.

Cause was shewn on Tuesday, the 21st January, by *East*, on affidavit, stating, that on the 22d November last, before the issuing of the writ, the defendant, who was then a practising attorney of the Court, and whose name was still admitted to be upon the Roll, applied for and obtained leave of absence for three years from the Court, in order to proceed to England; that on the 11th December he proceeded to Saughur, from which every person would naturally have presumed that he had left Calcutta with the intent of proceeding homewards upon his voyage, but instead of that he had proceeded to Midnapoor, and on the 5th January he had returned to Calcutta. The writ had issued against him in the meantime, on which he was afterwards taken; and it was therefore contended, that if the privilege of a prac-

tising attorney in Banco Regis was to be extended in like manner to the practising attornies of this Court, which, from the difference of situation and the different mode of originating proceedings against them, was denied; yet that, at all events, the defendant was not to be considered as a practising attorney after he had obtained leave of absence to go home, and had actually left Calcutta on his way to Saughur, whatever his real or subsequent intention might have been, which, it was suggested, was to get out of the way of his creditors.

The Court were satisfied that the privilege did not extend to the defendant under these circumstances. The only reason why it was admitted in any case was, not for the benefit of the attorney himself, but of the suitors who might employ him; and while he was in ordinary attendance upon the Court, and getting his livelihood by such business, the creditors of such a person had a hold of his forthcoming, nearly, if not quite, equivalent to his giving bail: but here he had himself previously declared his intention of relinquishing his business and of departing to England out of the jurisdiction of the Court; and after having actually left Calcutta, it did not lie in his mouth to claim a privilege as a practising attorney when he had relinquished his practice.

Rule discharged.

N.B. It was admitted that the question was the same as if the defendant had not put in bail, being compulsory on the arrest.

No. LIX.

SIR WILLIAM BURROUGHS, Bart., Junior Judge of the Court,

versus

CHISHOLM.[1]

1*st Term* 1817.

The Court having, as before stated, finally determined upon giving judgment for the penalty only of the bond, and leaving it to the several claimants and parties aggrieved to establish their respective claims upon the estate to the extent of the defendant's liability by bill, *scire facias*,

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[1] See *supra*, No. L.

or summary application, as they should be advised, and as the case might be. In the last Term of 1816

Fergusson moved the Court on behalf of Mrs. Dowling to establish her claim as a specialty creditor on the estate to the extent of the sum covenanted to be settled upon her, and to take the account of the sums received and remaining due, with interest, &c., she having in the meantime taken out letters of administration to her husband.

The Court, upon consideration, thought that the best course they could pursue for the benefit of all concerned was to refer it to the Registrar of the Court, to inquire and report specially upon the facts of her claim, with liberty to the defendant to go before the Registrar, and except as he should be advised, by which means the whole matter would be brought distinctly before them, so as to enable either party to appeal against the ultimate decision of the Court if he should be dissatisfied.

The nature of this reference, &c. will appear by the following Report of the Registrar, in substance, which was made and recorded in the 1st Term of 1817.

The Report, dated the 15th January 1817, stated, that in pursuance of an order made in the cause, dated the 4th November 1816, whereby it was ordered that it should be referred to the Registrar to ascertain and report to the Court the amount and particulars of the default of Robert Moore, administrator during the minority of Mary Ann Dowling, late Evans, with liberty to the defendant to go before the Registrar, and except to his Report, he (the Registrar) had issued the usual summons, and had been attended by the counsel and attornies of the plaintiff and defendant; having heard all such evidence, allegations, and observations as were offered on behalf of the respective clients, he finds,

That Robert Moore was, on the 16th September 1814, appointed administrator of John Evans, deceased, during the minority of Mary Ann Evans his widow; and that Moore continued to act as such administrator till the 15th May 1816, when his letters of administration were cancelled by an order of the Court, and on the same day letters of administration *de bonis non* were granted to Mary Ann Dowling, formerly Evans, in the goods of John Evans her late husband.

That Moore, while he was administrator of Evans, collected and received as such Rs. 56,191 . 9 annas from J. Duckett, for principal and

interest due from J. Duckett on the 6th December 1815, secured by mortgage; and on the 25th September 1815 Moore collected the further sum of Rs. 14,562 . 12 annas by the salé of Evans' effects, making altogether Rs. 70,754 . 5 annas, which came to Moore's hands as administrator as aforesaid.

That Mary Ann Evans, now Dowling, claimed the whole of the principal and interest received by Moore, viz. Rs. 56,191 . 9 annas, as a specialty creditor, under and by virtue of a certain deed of covenant made in contemplation of marriage between her and Evans, dated the 30th November 1811, and entered into by Evans of first part, R. Moore and R. Butler of the second part, and herself of the third part.

That Mrs. Dowling had never recovered any part of the said principal and interest received by Moore, and so covenanted to be settled by Evans; but the whole was still due and owing from the estate.

That divers simple contract debts were owing by Evans at the time of his death, as marked in Schedule A, to the amount of Rs. 19,011 . 4 annas, 11 pice, of which payment was demanded of Moore, and which he paid out of the assets, to the amount of R. 12,567 . 6 annas, 10 pice, as marked in Schedule B, leaving unpaid Rs. 6430 . 14 annas, 3 pice, as marked in Schedule C.

That after deducting the debts paid by Moore as aforesaid, there remained, on the 15th May 1816, in his hands the sum of Rs. 58,187 . 8 annas, 4 pice, which was afterwards demanded of him by Mrs. Dowling, as such administratrix, with interest at 8 per cent. from the respective periods when he received the items; but that Moore refused to pay the same.

To this Report the defendant took several exceptions.

1st, That the Registrar had found that Mrs. Dowling claimed the principal and interest received by Moore, amounting to Rs. 56,191 . 9 annas, as a specialty creditor, by virtue of the deed of covenant made in contemplation of marriage of the 30th November 1811; and that the Registrar had found the whole of the said principal and interest still due and owing from the said estate; whereas the whole of the said principal and interest, after Moore had received the same as administrator of Evans as aforesaid, was received or retained by the said Moore as the only trustee in India in the said deed of covenant, for

the use and benefit of Mrs. Evans, now Dowling, from the estate of Evans.

2dly, That the Registrar had not allowed Moore credit for Rs. 1178. 8 annas, due by Evans to Simpson, Wallace, and Rankin, on simple contract debt, for which they had granted a receipt to Moore, acknowledging their receipt from him of that sum by a promissory note given to them by Moore, which ought to have been allowed as a payment on account of the estate of Evans.

3dly, That the Registrar had not allowed Moore credit for Rs. 2302. 10 annas, 8 pice, due by Evans to Bhowannychurn Bonnerjee on a promissory note, which, on the 1st March 1816, was delivered up to Moore as administrator of Evans, in consideration that Moore had accepted bills of exchange, drawn on him by Bhowannychurn for the amount of the note, with interest, and which ought to have been allowed as a payment on account of the estate of Evans.

4thly, That the Registrar had not allowed commission to Moore for his administration of the assets of the said estate, which ought to have been allowed at the usual rate of £5 per cent. on all sums of money which came to Moore's hands as administrator of Evans.

Compton and *Eaton*, in support of the exceptions, argued in substance, that Evans covenanted to settle Rs. 50,000 belonging to his wife on her and the issue, &c. Mr. Johnson, Evans' attorney, proved that Evans himself told him that he had laid out this very sum in mortgage to Duckett. On Evans' death, Moore, who was a trustee under the settlement, took out letters of administration to Evans' estate *durante minoritate* of Mrs. Evans, Moore's daughter, and afterwards Moore, who was in a state of insolvency at the time, received the whole money from Duckett, which he afterwards dissipated. On this an action was brought on the administration surety bond, against Chisholm, the surety of Moore, and the Court found in fact that Moore had received the money, as administrator of Evans, from Duckett, and had not accounted for it. Still it was open to the defendant to contend that the money was either received at first in point of law by Moore, as trustee, and not as assets; or if received by him in fact as assets, it was afterwards retained by him as trustee. For though it were true that Moore received it in fact as administrator, by giving the receipt for it as such,

because required to do so by Duckett (though Moore himself swore that he considered himself as receiving it as trustee), yet if in point of law it were no part of the general assets of Evans's estate, then Duckett would have paid it in his own wrong to Moore, as administrator, and therefore Moore's surety would not be liable to make it good, he being only answerable for Moore's due administration of the assets. They contended, that, 1st, This sum was not assets of Evans, and if not such, in law or equity the surety could not be liable. 2dly, Moore being a trustee under the settlement, though he received the money in fact as administrator, yet it must be taken in law that he retained it as trustee, according to his duty. 3dly, Especially if there were any evidence that Moore dealt with the money as trustee. As to the first. By the deed of covenant before marriage it appears that the Rs. 50,000 was the money of Miss Moore, Evans' intended wife, and he acknowledged the receipt of the money, which he covenants to hold in trust for the trustees till the marriage, and until he should execute a regular deed of settlement, and covenanted to convey it to the trustees within four years, or sooner if required; and then he declares the future uses. After the marriage the contract was executed. If executed by a settlement it would have ceased to be assets of Evans; but what was done was equivalent in equity. It was laid out in mortgage to Duckett, as Evans himself stated to Mr. Johnson, his attorney.

They cited on this head of assets, Prec. in Chanc. 119; 3 Atk. 610; Prec. in Chanc. 237; 1 Dickens, 5; 4 Bro. P. C. 343; 2 Vern. 101; Finch, 232; 3 P. Wms. 211; 1 Bro. Ch. Ca. 582; 2 Keb. 841.

If then the Rs. 50,000 were not assets, the surety (defendant) could not be liable. 2dly, Supposing the legal estate in the fund was still in Evans' administrator, yet as this sum was appropriated by Evans himself to the object of the trust, and Moore himself, the administrator, being also the trustee, it must be taken that he retained it as trustee, as soon as it came to his hands as administrator, according to his duty. Thus in the case of an executor, who is also a legatee, it is sufficient that he assent to his legacy, either expressly or impliedly, to vest the legacy in his own right; Toller's Ex. 345. There, however, there is no duty imposed upon him to assent, as there is in the case of a trustee; and therefore the law would go further to presume assent in the latter

case. But, 3dly, There is evidence here of Moore's having assented to retain this money as trustee. The not putting this sum into his schedule was evidence to shew that he meant to take it as trustee; the very largeness of the sum and the notoriety of the transaction preclude the supposition that he meditated a fraudulent concealment by keeping it out of the schedule. Besides this, Moore consulted Mr. Taylor, the attorney, before he would give the receipt for the money to Duckett in his character of administrator, when, as he himself swore, he meant to receive it as trustee, and, finally, Duckett paid a part of the mortgage money to Mrs. Evans, while she was living with Moore, after her husband's death, which Moore allowed in account with Duckett; and this was an express acknowledgment of the trust. A part was also paid to her in the lifetime of her husband by Duckett; and this was also admitted. Duckett headed the account thus: "Mrs. Evans in account with me;" Rs. 680 were paid to her in the lifetime of her husband; Rs. 1000 to Moore for her, and Rs. 520 to Mrs. Evans herself while living with Moore. These sums Moore swore were paid to her out of the interest of the mortgage money.

Fergusson, A. G. and *Hogg*, for Mrs. Dowling, admitted that Mr. Evans was to be considered in equity as a trustee for the benefit of his intended wife, under the deed of covenant, till the marriage; and that he continued so afterwards upon his covenant, until he should, by deed or other instrument in due form of law, settle and assure the Rs. 50,000 to the uses afterwards declared. These uses were, that he, his heirs, or executors, &c. should, within four years from the 30th Nov. 1811, or earlier, upon request by either of the trustees, &c., if Evans should then be in the East Indies, invest the same in the purchase of Government securities, or in the purchase of real property; and if Evans should be in Great Britain, as he and his intended wife, or the survivor of them, should deem most desirable; and in the event of no such requisition, as the trustees, &c. should deem meet; with power to them, &c. to change the securities, so as the best interest, produce, and profit might be made, without lessening the principal. And the uses of the money, when invested, were declared to be to the use of Evans and his intended wife for their lives, and the life of the survivor, in bar of her dower or thirds, remainder to the trustees, &c., to receive and take the

rents and interest &c., and pay and apply the same for the maintenance and education of the child, or children, of the marriage, for the sons at twenty-one, and for the daughters at twenty-one, or day of marriage with consent of the trustees; and in case of the death of any son or daughter before those events respectively, his or her share to revert, remainder in case of the death of all the children before twenty-one, or marriage respectively as aforesaid, then in trust, for such uses, purposes, and disposition of the said sum, &c., as should be made by the survivor of Evans and his intended wife, by his or her will, or by any deed or instrument in writing made and executed in due form of law for that purpose; and in default of any such disposition, then to the executors or administrators of Evans. Now as Evans was not called upon by the trustees to execute the settlement covenanted for within the four years, and he died within that period, there was no breach of his covenant in his lifetime; and as, on his death without issue, the money was at the absolute disposal of his wife who survived him, there was altogether an end of the trust. *Goodtitle* v. *Othway*, 2 Wils.; 3 Burr. 1388. The money was still part of his estate at law. There could be no retainer by the trustee, when he was no longer entitled to receive the money, by the execution of the trust in Mrs. Evans absolutely. But supposing the trust to have still formerly subsisted, the trustee could only retain by the actual application to the purpose of the trust. A retainer must discharge the intestate covenanter's estate; but such a retainer as is now set up would not discharge the intestate's estate, for that could only be discharged by complying with Evans' covenant, which was not done. Moore could only retain for Mrs. Evans, and not for himself. Mrs. Evans was entitled by the terms of the covenant, and as specialty creditor, in equity to the whole of the money absolutely, and the money must have been paid over to her, or invested for her benefit to make it a retainer. This is a new attempt to set up a retainer by a trustee against his *cestui que trust.* In 2 Blac. 965, an executor was held entitled, as a specialty creditor, to retain; 4 Ves. 763; 1 P. Wms. 429. In no case will equity enforce articles against the intent of a *cestui que trust.* According to *Pyke* v. *Pyke*, marriage articles shall be held executed or executory according to the intent of the parties; 2 Show. 403; *Benson* v. *Benson*, 1 P. Wms. 130.

In the case of a covenant only for jointure, the sum covenanted to be laid out must remain the assets at law of the covenanter, till the widow makes her election: she may waive the covenant and take what the law would otherwise give her. Where the trust was to lay out money in land, the Court would not presume the execution of the trust from the mere purchase of land in the name of the trustee himself; *Perry* v. *Philips*, 4 Ves. 108. Prec. in Chan. 168; 3 Ves. 467; 1 Rol. Abr. 910. Here the trustee has not in fact retained. The circumstances stated are mere negative acts, not so strong as in *Perry* v. *Philips*.

Compton in reply, contended that Mrs. Evans had not an absolute right in the money: if she did not dispose of it, it was to go to Evans's administrator, who had therefore a beneficial interest in it. In 3 Burr. 1381, when an administrator was enabled to retain as trustee for another he had six months to do the act.

In 2 P. Wms. 258, it was held that an executor may retain for a debt held in trust for himself.

The *Court*, after consideration, held that the defendant, the surety of Moore, was liable to the extent of Mrs. Dowling's demand.

Note by Sir E. H. East.—It appeared to me, 1st, That there was a subsisting trust in favour of Mrs. Evans, under the deed of covenant, for otherwise she could not be entitled, in the events that had happened, to the whole fund, but only to a moiety, as the widow of Evans; his own relations being entitled to the other moiety under the statute of distributions. 2dly, That at law the sums of money in question were the assets of Evans, though in equity it might be followed and appropriated to the satisfaction of his covenant. He acknowledged the receipt of the Rs. 50,000, as the fortune of his intended wife, and he covenanted with trustees to settle it to certain uses of the marriage. The legal ownership of the money was never devested out of him; for when he laid out that sum in mortgage, though the evidence shews it was the precise money, yet he took the security in his own name, and not in the name of the trustees: of necessity, therefore, upon his death it constituted part of his assets in the hands of his personal representatives; and whether it were general or special assets, it would be still part of his estate. I should have considered that this money might be followed by the trustees as the specific fortune of Mrs. Evans,

covenanted by her husband to be settled on her, and that his administrator took it subject to the trust; but if the legal estate was in the administrator, though clothed with a trust, it would be sufficient to make him and his sureties answerable for his due administration of it: and indeed it would be difficult to say that the administrator had not ever a beneficial interest in it; for though she had an absolute power of disposing of the money after her husband's death without issue, by any writing or by will, and might have called probably for a conveyance to herself from the administrator or the trustee, yet in default of her disposition, it was to go to the administrator or executor of the husband.[1] 3dly, Supposing this to be assets for which Moore was liable to account upon the receipt of them, the evidence on which the Court before decided was, that he did expressly, by his acknowledgment in writing, receive payment of the mortgage money from Duckett, as administrator of Evans, and had not accounted for such receipt, in consequence of which his administration bond, and that of his sureties, became forfeited; but this, it may be admitted for the sake of the argument, would not be enforced against the surety in equity, if, in point of law, and without evidence in fact to support it, Moore, who was also trustee under the deed of covenant, as well as administrator of Evans, must be taken to have retained the money in his character of trustee the instant that it came to his hands as administrator; but no such principle appeared to me to be established. It appeared necessary to shew by evidence that the money which came to Moore as administrator, was by him in fact retained as trustee; and I could not consider that the mere fact of wasting the money when received was evidence of his retaining it as trustee. I was most inclined to consider that, as against the plaintiff, who claimed as a specialty creditor in equity upon her husband's assets, nothing could discharge his administrator, being once fixed with these assets, but shewing an actual application of the money according to the terms of the trust; but at any rate no such retainer could be evidenced without precise evidence of some act done by him, shewing that he dealt with it exclusively as trustee, such as a transfer of the sum into

[1] See *Taylor* v. *Plumer*, 3 Maule and S. 562, and the cases there cited. *Sowden* v. *Sowden*, 1 Brown Ch. Rep. 582; *Anderson* v. *Dawson*, 15 Ves. 532; *Bradley* v. *Westcott*, 13 Ves. 445; *Barford* v. *Street*, 16 Ves. 135.

the account of the trust fund, depositing the money for the use of the trust, or some such unequivocal act of accepting it *bonâ fide* as trustee, and not for the purpose of spoiling his *cestui que trust.* If in *Perry* v. *Philips*[1], a trustee for the purchase of land, receiving the funds and purchasing land, but taking the conveyances in his own name, was held not sufficient to raise a presumption that they were purchased in execution of the trust (a conclusion which was thought to be warranted by Lord Kenyon, when Master of the Rolls, in *Sowden* v. *Sowden,* and which, but for the subsequent decision, I should have been most inclined to adopt); still less can the fact of receiving and misapplying the money for his own purposes be evidence to raise such a presumption. Then, as to the facts relied on in evidence for that purpose, 1st. The fraud or breach of duty in neglecting to put the Rs. 50,000 in his account rendered on the ecclesiastical side on oath, though he had expressly, and upon consultation with his attorney, acknowledged under his hand his receipt of it as administrator, cannot be evidence to shew that he afterwards applied it as trustee. In fact, the evidence of his written receipt was afterwards brought forward to contradict his first assertion that he had originally received it as trustee, and not as administrator, which he had sworn to. 2dly, His previous consultation with Mr. Taylor, in what form he should give the receipt, is evidence rather against than for the conclusion contended for, as it was ultimately determined that he could only receive it as administrator. Then, 3dly, As to the several payments to Mrs. Evans by Duckett, which it was said were recognized by Moore, they were quite equivocal; for at all events she was entitled to recover that amount, and more, after Evans' death, before which she could only receive it for him, and that as well from Moore in his character of administrator as of trustee; and besides, Duckett would not have paid the remainder to Moore without these allowances having been made to him; and Moore was ready to accede to any thing in order to get the money into his hands for his own purposes, as it plainly appears.

So that, neither in law or in fact, has Moore, the administrator, acquitted himself of his trust by a due administration of the assets which came to his hands; and he, Moore, in his own person, having received

[1] 4 Ves. 108. 17 Ves. 173.

the assets as administrator, and wrongfully converted them to his own use, cannot be permitted to divide his person and his own wrong against the injured party, and deprive her of her election to sue him in his representative character, though the wrong he has done may be against his duty in both characters.

No. LX.

DABYCHURN MITTER AND OTHERS
versus
RADACHURN MITTER AND OTHERS.

10*th February* 1817.

THIS was a bill filed for an account of joint personal estate, and of the rents and profits of real estates descended from Bejayram Mitter and Collychurn Mitter, and for a partition of the same.

It appeared that all the parties were descended from Bejayram Mitter, who died on the 17th December 1775, leaving a son, Collychurn, who died on the 26th January 1783.

Collychurn had two wives; by the first of whom, Tarraney Dossee, he had issue the plaintiffs.

Collychurn was a lunatic when he married Doorga Dossee his second wife, which was above thirty years before the bill was filed, and no objection appeared to have been made by the family before; but now it was contended, that, for want of his ability to consent, the second marriage was void, and therefore that the issue had no right to inherit with the descendants of the first marriage, though they had been always living together in the family house, and, till a late period, had received a certain monthly allowance, which seemed to bear some proportion to the share of those who received it.

The main point was on the validity of the marriage, which was maintained to be good by the Hindú law, though Collychurn was a lunatic when the marriage was contracted; for which

Fergusson, A. G., and *Macnaghten* cited the Dáyabhága, and observed that Hindú infants of the tenderest age were marriageable, and most frequently married, and that they were as incapable in fact of giving consent as a lunatic.

Compton, for the defendants, said, that the Hindú law books laid it

down as clear that idiots and lunatics cannot inherit; and that it would be strange, if that were the case, that they should be able to transmit property.

The following questions were thereupon put to the Pandits—

Q. 1. By the Hindú law, is the marriage of a lunatic, by consent of his family, binding?

A. The marriage of a lunatic, *à nativitate*, is immoral, but valid with the consent of parents. The marriage of one who becomes lunatic after his birth, and during his lunacy, is valid.

Q. 2. Is the marriage in this latter case valid without the consent of parents if living, or, if dead, of the family?

A. Under every circumstance, if such a marriage be contracted, it is valid.

The Court decreed for an account and partition.

No. LXI.

DOE DEM. BHOBANNYPERSAUD GHOSE
versus
TEERPOORACHURN MITTER.

20th March 1817.

THIS was an ejectment brought to recover possession of a moiety of a messuage, and 3 *Bighás*, and 19 *Cottahs*, of land, at Tootonga, in Calcutta.

The property had been purchased by Toolseram Ghose, the lessor's father, in the year 1798 (1205 B. S.). He died in June 1805, leaving two sons, Seebpersaud, then about eighteen years of age, and Bhobannypersaud, the lessor, then about ten years old and upwards, and a considerable property both real and personal.

Seebpersaud took upon himself the management of the family, and of the family property, and in Phalgun 1214 B. S. sold the property in question to the defendant, as a part of the estate which was then unproductive, and in order, as it seemed probable, for the sake of some ready money, it being outlying property of moderate value. The sale was made without any collusion or any fraud on the part of the defendant, who paid Rs. 2425 for it, which was at the rate of Rs. 30 per *Cottah*, about the medium value of lands in that part of the town at that period, none selling higher than Rs. 40.

The lessor of the plaintiff was born in Asvina 1202 B. S., and was about twelve years and a half old at the time of the sale in 1214, which sale was notorious in the family at the time, and the price of the land was then regularly credited in the family books; and the lessor continued all along, and up to the time of bringing this action, to live in the family house in Calcutta.

The lessor came of age in Asvina 1218 B. S.; but about a year before that time the keeping of the books had been made over to him, and his signature had been obtained to a balance in the books, which included this sum.

But the Court were clear that a signature so obtained by his brother Seebpersaud, with reference only to the mere figures in the books as rightly cast up, and without reference to the circumstance of the sale in question, and while the lessor was under age, could not in any respect affect the question as to the legality of the sale.

It appeared, further, that after the purchase by the defendant, he caused a tank to be dug on the premises in 1215 B. S., and carried on some gradual repairs in building, and some additional improvement to the same, from that time down to 1217 B. S. inclusive; when, in consequence of some doubts being intimated as to the title, he stopped, and did not recommence building till Sravana 1220 B. S., after which time considerable and valuable buildings were added by him, to the extent of about Rs. 6000. And it was proved on the part of the defendant, that, in Jyeshta 1220 B. S., about two months before the buildings were resumed, the defendant had called upon the lessor of the plaintiff, and, after reminding him of the sale of the ground to the defendant by the lessor's brother, and that he had already erected some buildings on it, he added, that, owing to what he had heard from some persons, he had desisted from further building (alluding to the objection started to the title); on which the lessor said that he acquiesced in, and agreed to, the sale which his brother had made; that he made no objection, as the defendant was a relation (this was only in Cast); and that he might go on and erect what buildings he pleased.

After this, it appeared that the lessor had stood by and knew of the defendant's going on with his buildings till about half a year before this action was brought, when he objected to the title, which was about five

years and a half after he came of age, and about nine years after his knowledge of the sale made by his brother.

Compton, for the lessor of the plaintiff, contended that the elder brother, manager of an undivided Hindú family estate, had no authority to dispose of it as against the shares of the younger branches of the family, except in certain known excepted cases. 1st, From necessity to preserve the family from want and distress; 2dly, For the debts of the ancestor; and, 3dly, For the performance of certain necessary religious ceremonies required by their law, neither of which applied to this case. He admitted that the act of such manager would be good to bind all the rest, if assented to by them at the time, and that many circumstances might amount to evidence of such consent: but then, to affect the interest of the others who are not parties to the sale, it must appear that they were in a capacity to assent to the sale at the time, which an infant is not: and, as he contended that such sale was absolutely void, and not merely voidable, as against the infant, that it was not capable of being subsequently confirmed after he came of age. In the one case the deed had a legitimate inception, and might therefore be confirmed at any time, because it was capable of binding the absent adult at the time. In the case of an infant, being void *ab initio*, it could not afterwards be confirmed by him, any more than the deed of a stranger could be so confirmed. He cited for the general doctrine the case of *Sashachella Pillay* v. *Vencatachella Pillay and others*, 2 Str. 234.

Fergusson, A. G., for the defendant (after touching upon a cause of necessity to defray the expenses of the mother's pilgrimage to Benares, for which there was no ground in evidence), argued, that it was a commonly received opinion amongst Hindú lawyers, that the eldest managing brother of a joint estate might sell for any purpose, provided there were a sufficient remaining real estate of the ancestor out of which compensation might be made on a division to the younger brothers; for otherwise even the adult brother would not be able to sell his share, for who would purchase a half, or a third, or an eighth, or smaller share, of an estate to hold with strangers. Here there was an ample estate left out of which to make compensation; and therefore the sale, having been made *bonâ fide*, was binding, and the lessor must take his compensation out of the residue. But here he had also expressly confirmed the sale

after he came of age, which it was competent for him to do; and he still received the benefit of the purchase money, which was carried to the joint account.

The following questions were here put to the Pandits:—

1st, If an elder Hindú managing brother, being of age, and having a younger brother, under age, sell a part of the fixed property, without fraud or collusion with the purchaser, and carry the purchase money to the credit of the joint estate; and if the younger brother, two years after he comes of age, give an express consent to the sale; will that bind him?

2dly, Would it bind him, if he, having full knowledge of the sale, and of the joint estate being credited with the purchase money, lay by for five years and a half without objection, seeing the purchaser laying out large sums of money in building on the land?

The Pandits answered both these questions in the affirmative.

The Court gave judgment for the defendant.

Note by Sir E. H. East.—The second question was put to the Pandits in this case, because one of the Judges had some doubts as to the truth of the evidence of express consent, though the stopping of the building for between two and three years, and the resumption of it afterwards, seemed to be a strong confirmation of it. But the answer to the second question made an end of all doubt. It seemed, indeed, to be a very clear case, upon the general evidence of confirmation by the infant after he came of age, even without the help of the express evidence. 1st, The notoriety of the sale in his family, where he lived all the time, which happened when he was twelve years and a half old; which knowledge was continually renewed to him by the entries in the books, of which he had the keeping before he came of age, the purchase money having been carried to the credit account of the estate in those books. 2dly, The buildings and improvements on the ground were going on, except during the interval mentioned, within the knowledge of the lessor, without any objection, for five years and a half after he came of age, reckoning this only from that time; though in fact he had the benefit of such knowledge in the whole for nine years before he objected, living all the time in his family when the circumstances of the estate must have been continually discussed, according to the known manner of the Hindús. 3dly, He took an active part in the management of the joint property

after he came of age, which precluded all suspicion of inadvertence; and not long after disputes had arisen between the brothers concerning the elder's management. Added to this was, 4thly, The evidence of the express confirmation.

No LXII.

EDWARD STRETTELL, Esq., Advocate General of the United Company of Merchants of England trading to the East Indies at their Presidency of Fort William in Bengal, at the relation of JOHN MARTIN WICKINS

versus

JOHN PALMER and JEAN JAQUES DEVERINE, Executors of MAJOR-GENERAL CLAUDE MARTIN, deceased.

4th Term 1816.

A bill was filed, entitled as above, by *Strettell, A. G.*, against the defendants, for the purpose of establishing the charitable trusts of General Martin's will, &c. At the end of the year 1816 Mr. Strettell went home for his health, and Mr. Fergusson was appointed A. G. in his place *pro tempore;* and it became a question (*in camerâ*) how the further proceedings in this information should be continued. In respect to which it appears,

That the title of the original bill is not to be changed; for the fact still remains, that the original information to the Court was given by Edward Strettell, Esq., on behalf of the King, according to the directions of the Statute 53d Geo. III. c. 55. s. 3., and the proceedings on an information can only abate by the death or determination of the interest of the defendant.

When, indeed, such official information is filed on the relation of several individuals, whose names are inserted in order merely to make them liable for costs, not even an order is necessary, unless *all* the relators die. In that case (or on the death of a single relator) the Court will not permit any further proceeding till an order has been made for liberty to insert the name of a new relator; but that is merely for the purpose of subjecting him to costs, which does not apply to *ex officio* informations.

Quære, If there be any case, except that of a new bill, where it is necessary to name the individual Advocate General? But if there be

such, it should seem sufficient merely to name "*Richard C. Fergusson, who is now the Advocate General of the Company, &c. in the place of Edward Strettell.*"

No. LXIII.

DOE DEM. SAVAGE

versus

BANCHARAM THAKOOR.

28th March 1785.

The note of this case has been already printed *verbatim* in Smoult's Rules and Orders, pp. 88—91; and will be found in an abridged form in Morton's Decisions, p. 70.

No. LXIV.

GOPEYMOHUN THAKOOR

versus

SEBUN COWER, JAGGERNAUT DOSS BABOO, BULRAM DOSS BABOO, SITAUB COWER, AND GOBERCHURN DOSS BABOO.

11*th February* 1817.

THE complainant, Gopeymohun Thakoor, and one James Eaby (a British subject, now deceased, whose name having been merely used *pro formâ*, was, under an order of Court, made on the 31st October 1816, omitted as a complainant in the further proceedings in this suit), by the bill filed on the 26th April 1815, stated,

That Samuel Doss and Saumchern Doss, Baboos, Hindús, deceased, being, or pretending to be, seised in fee, and possessed of, or otherwise entitled to, certain landed property therein mentioned, and having obtained a loan from Ramduloll Day of S. Rs. 150,000, for securing the repayment thereof, with interest at 10 per cent., by indentures of lease and release of the 22d and 23d February 1810, conveyed Cossinauth's Bázár &c. to him and his heirs, subject to a promise of redemption on repayment of the principal and interest. That Saumchern died in 1810, leaving Sebun Cower (one of the defendants) his widow, and an adopted son, Goberchurn Doss (the second son of the body of Samuel Doss), his heir and legal representative.

That Samuel Doss (after the death of Saumchern his brother) being seised in fee of other property &c., obtained from Ramnarain Ghose a

further loan of S. Rs. 85,000, at 10 per cent., and, to secure the same, executed to him and his heirs indentures of lease and release of the 11th and 12th November 1810, conveying Samuel Doss's family-house &c. at Bura Bázár, subject to redemption on repayment of principal and interest.

That Samuel Doss, Sebun Cower (widow of Saumchern Doss), and Sentopersaud, also a Hindú, deceased, being, or pretending to be, seised in fee, and possessed of or otherwise entitled to them, and their heirs, to the several messuages and premises above mentioned, and also to a parcel of land called the New Postate, in Bura Bázár, obtained a further loan of S. Rs. 65,000 from the complainant, Gopeymohun Thakoor; and to secure the same, with interest at 10 per cent., mortgaged and conveyed all their interest in the before-mentioned premises, and also all the interest of Saumchern Doss which he had in his lifetime therein, and also the said New Postate, &c., by indentures of lease and release of the 31st March and 1st April 1813, made between Samuel Doss, Sebun Cower, and Sentopersaud, of the one part, and Gopeymohun Thakoor of the other part, the name of James Eaby, the other complainant, being inserted therein merely as a trustee for Gopeymohun, in which indentures were recited the two former mortgages, *habendum* to Gopeymohun in fee, subject to redemption on repayment of principal and interest by the mortgagors, their heirs, representatives, and assigns, on or before the 1st October 1813. This conveyance contained the usual covenants for title from all the mortgagors, and against incumbrances, except ground rents and the prior mortgages, together with the other common covenants.

That before the last-mentioned loan of S. Rs. 65,000 and interest had been repaid, Samuel Doss died on the 3d September 1814, leaving Jaggernaut Doss and Bulram Doss (defendants), his sons, heirs, and legal representatives; and Sentopersaud also died on the 11th November 1813, without issue, leaving Sitaub Cower, his only widow, heir and legal personal representative; which said Jaggernaut Doss and Bulram Doss, as sons, heirs, and legal personal representatives of Samuel Doss, and the said Sitaub Cower, as widow and legal representative of Sentopersaud, and the said Sebun Cower, as widow, and Goberchurn Doss, as such adopted son, heir, and legal personal representative of Saumchern

Doss, deceased, all, or some, or one of them, are now in possession of the premises, &c.

That on the 11th December 1813 Ramduloll Day filed a bill of foreclosure against Samuel Doss, Sebun Cower, Jaggernaut Doss, and Goberchurn Doss, which, on the death of Samuel Doss, was revived on the 22d September 1814 against Jaggernaut, Goberchurn, and Bulram; and on the 3d February 1815 obtained a decree for a sale, and to discharge out of the proceeds S. Rs. 219,954 . 2 annas, 8 pice, due to him for principal and interest up to the 20th June 1814, and that the Master only advertised for sale a certain part of the mortgaged premises.

That on the 14th October 1814 Ramnarain Ghose filed his bill of foreclosure against Jaggernaut, Goberchurn, and Bulram Doss, for the like purpose, and obtained a decree for repayment of S. Rs. 82,795 . 2 annas, 3 pice, due to him for principal and interest, and further sale to satisfy the same.

That all the mortgaged premises were the estate in fee of Cossinauth, a Hindú, deceased, the father of Samuel Doss and Saumchern Doss, on whom, on his death, they descended, and came into the possession of, as his only sons and heirs. That Cossinauth and his said two sons were an undivided Hindú family in property and living, and that Samuel and Saumchern Doss, and their sons aforesaid, have ever since continued to be an undivided family in property and living.

That the principal and interest aforesaid is still due to the complainant.

And the bill concluded by praying for an account to be taken of the principal and interest due on the said mortgage to the plaintiff, and for payment of the same at a short day, or that the defendants should be foreclosed of their equity of redemption of the New Postate, and the said other premises therein mentioned; and that the surplus, if any, of the proceeds of the sale of the said other premises under the former mortgages recited, after satisfying Ramduloll Day and Ramnarain Ghose, might be applied by the Accountant General in discharge of the mortgage money due to the complainant, &c. &c.

The bill was taken *pro confesso* against the defendants Sebun Cower and Sitaub Cower; and the other defendants, by their guardians, answered that they were infants and Hindús under sixteen years of age, and submitted their rights to the protection of the Court.

By the depositions taken against these latter, it appeared that Samuel and Saumchern were the only sons of Cossinauth, deceased, from whom the property in question descended to them, and who continued to live as an undivided family after their father's death.

That the several mortgages were made at the times of their respective dates by the respective parties named.

That Saumchern died first, in 1810, leaving Sebun Cower his widow, and Goberchurn Doss (the second son of his brother Samuel), his adopted son, his heirs (which Goberchurn is no party to the deed of mortgage to the complainant).

That Samuel Doss died after the mortgage in question, viz. in 1814, leaving the infant defendants, Jaggernaut Doss and Bulram Doss, his only sons and heirs (Goberchurn having ceased to be his son and heir by the Hindú law, in consequence of his adoption by Saumchern).

That Sentopersaud (the other party to the mortgage) afterwards died in November 1813, leaving no son, but a widow, Sitaub, who is made a defendant, and two daughters, Beburn and Sevun.

The Master reported the sum due for principal and interest, and the cause came on to be heard, when

Fergusson, A. G., was heard for the complainant, and prayed the usual decree for a foreclosure or sale.

East and Macnaghten, for the infant defendants, submitted their rights to the Court.

The case presented two points of difficulty to the Court.

There were three mortgagee parties to the mortgage deeds of the 31st March and the 1st April 1813; viz. 1st, Samuel Doss; 2d, Sebun Cower; and 3d, Sentopersaud.

1st, As to Samuel Doss, who had a moiety of the undivided patrimonial estate which was mortgaged, there was no doubt of his right to bind his moiety; and he was now, since his death, properly represented before the Court by the defendants, Jaggernaut Doss and Bulram Doss, his two infant sons and heirs. By Saumchern's adoption of Samuel Doss's second son Goberchurn, the latter ceased, by the Hindú law, to be considered as a son and heir of Samuel Doss, his natural father, but became the son and heir of Saumchern, his adopted father.

2d, As to Sebun Cower, who was the widow of Saumchern, this dif-

ficulty arose. The other moiety of the mortgaged premises appeared to be in Saumchern, and the question was whether he was properly represented, so as to bind that moiety. The title to that moiety was evidently in his adopted son Goberchurn, the infant, who was properly brought before the Court by the bill, but who was no party to the mortgage deed, nor, indeed, could have been, by reason of his infancy. Sebun Cower, the widow of Saumchern, and by whom the mortgage was executed, had clearly no interest in the estate, having only a right of maintenance from the infant son; and her power to execute such a mortgage could only be supported by actual necessity, either for the payment of the debts of her husband, or for the performance of his *shrád*, or other necessary religious observances, or for the absolute maintenance of herself and family; but none of these things were proved in evidence, nor were they even recited in the deed, though it was probable enough, from the circumstances of the family, that the sum might, in whole or in part, have been necessary to be raised, both for payment of debts and the due support of the family.

Standing as it did, the Court said they could only decree a sale of the moiety, unless *Mr. Fergusson* was able to amend his bill, so as to introduce the question of necessity, whereby to warrant the mortgage made by the widow, supposing the question could be raised upon a mortgage which did not purport to have been executed by her in the infant son and heir's name, or by virtue of the power given in such case to the widow under the Hindú law.

The case stood over for *Mr. Fergusson* to consult his client on this ground; but as he finally waived the liberty to amend, the Court only gave him a decree for a sale of the moiety of the mortgaged premises.

The case was decided ultimately upon the above ground.

Note by Sir E. H. East.—Much discussion took place before the ultimate decision upon the interest of Sentopersaud, the third party to the mortgage deeds. *Prima facie*, the Court were of opinion, that if the contrary did not appear, they must take it that the three mortgagors were each seised of one-third of the mortgaged premises, in his or her own right; that if (as it was suggested) the name of Sentopersaud was only introduced into the conveyance for the better assurance of the lender of the

money by the addition of Sentopersaud's personal security, that ought, in strictness, to have been introduced by an averment of the fact; but the Court were disposed to think that the fact might be collected by inference, and that it did upon the whole appear that the mortgaged property, of which Cossinauth was averred to have been once seised, and which was stated to have descended to his two sons, Samuel Doss and Saumchern Doss, must be now in the descendants or heirs of those two, which of course excluded Sentopersaud from having any share thereof; and that the Court might the more easily dispense with the strictness of pleading, as the 18th Section of the Charter, constituting the Supreme Court to be a Court of Equity, gave us full power and authority to administer justice in a summary manner, as nearly as may be according to the rules and proceedings of the Court of Chancery, and the difficulty hereafter stated was thus got rid of.

That difficulty was upon the question whether Sentopersaud was properly represented by Sitaub Cower, his widow, alone, without joining his two daughters, Beburn and Sevun; for the objection, if well founded, must have gone this length, without joining the next heir male. For as it was suggested, no person, by virtue of their own estate, could bind the property *suo jure*, unless they had the whole estate of inheritance in them at the time, which neither a widow nor a daughter of a Hindú could have, they having no more than life estates in the realty, in default of sons of the person last seised; and therefore the power of these to sell in any case only stood upon the ground of necessity in the given cases recognized by the Hindú law.

Upon this point the Court put several questions to the Pandits, who answered as follows—

1st, A Hindú woman never can sell a real estate (except under the power in the excepted cases) if there be any relations of the last owner to take; and if there be no such relations it would go to the Government (the Rájah, as they said).

2dly, If the widow of a Hindú (having no son) die before the daughter being married, but not being past child-bearing, she, the daughter, would inherit after her mother; and if she, the daughter, had a son, he would inherit after her.

3dly, If the daughter have any issue, she takes the inheritance first;

but if she be a widow without children, she has no inheritance in the land.

4thly, The widow may sell the real property for the debts of her husband, but the heir may put the purchaser upon the proof of the debt.

It was stated at the bar to have been the general practice only to make the widow a party to the bill where there was no son; and the great inconvenience of seeking for remote relations in the male line was much insisted on. With respect to the practice, we directed a search to be made for precedents, but we did not derive any satisfaction from the result, the instances referred to being scanty and recent. It would have been necessary, therefore, to have decided the point upon principle, if it had been decided at all.

These considerations had occurred to me, which I mentioned shortly in Court, but reserving my ultimate opinion till the point should necessarily arise.

In the case of Hindús, the real and personal estate going to the same person, there is no occasion for the mortgage creditor (or other creditor, according to the nature of the debt) to look to different representatives of his deceased debtor; and if there be no reason for doing so, from the different funds, real and personal, being in different hands, general convenience will be better consulted by preserving the unity of responsibility. Now, not only are the real and personal funds in the same hands, namely, of the widow, in case there be no son; but by the same law she may be sued for any debt of her deceased husband, and, after judgment recovered, execution would go equally against his lands in her hands, as against his personal property. It is, moreover, her duty to pay off the mortgage debt, as well as all other debts of her husband, provided there are assets, either real or personal; and if she alone may sell, why may not she alone be sued?

Putting the mortgage security out of the question, if the creditor had sued for the money lent, at law, and recovered judgment against her alone, he would have been entitled to take the lands in execution for the debt of the husband. Why then should it be necessary to sue different persons in equity for the same purpose, assuming that purpose to be for *sale* of the land for the payment of the debt? If, indeed, the

purpose were for a foreclosure merely (which is to acquire an interest *ultra* the debt), the case might admit of a different consideration; but the reason of the case is exactly the same where the object of the mortgagee is merely to recover the value of his debt by obtaining a decree for a sale, returning the surplus to the representative who was before in the possession of the whole. The one is an equitable, as the other is a legal, execution for the debt; and there can be no reason (as there is in England where the real and personal representatives are different persons) for encumbering the proceeding with additional parties in the one case, who would not be necessary in the other.

These considerations may deserve more attention when it is further considered that the distinction between real and personal property in England is founded altogether on the feudal system, which is foreign to the Hindú law; at least, in respect to the succession of property amongst individuals, it is *positivi juris*, and not founded upon general principles of justice and equity. And, by our Charter, the British law, in respect to the security of creditors, is made more conformable to the spirit of the Hindú law, by subjecting real as well as personal estate to execution for debt in an action against the executors or administrators, which, by construction, has been held to extend to giving those representatives the power of selling the land in the first instance.

But even in England some limit has been put, on account of the manifest inconvenience and expense, to the bringing before the Court every person in whom the ultimate inheritance of the land may be, or is, vested. Thus, in the common case of entails, it is sufficient to bring before the Court the first tenant in tail upon a bill of foreclosure or sale.

And though it is laid down in 1 Powel on Mortgages, 430, that, upon a bill by a second mortgagee to redeem the first mortgage, the mortgagor or his heirs must be brought before the Court, for without him complete justice cannot be done to all the parties, *Fell* v. *Brown*, 2 Bro. Ch. Rep. 276, for the natural decree is, that the second shall redeem the first mortgagee, and the mortgagor shall redeem him or stand foreclosed; yet, in 15 Vin. Abr. 447. s. 19. it is said—"*A* mortgages two estates to *B*, and afterwards makes a second mortgage of the one estate to *C*, and the other estate to *D*; and the question being whether the

Court could decree a redemption of *B*'s original mortgage, by proportionable contributions of *C* and *D*, the two puisne mortgagees, the Lord Chancellor, after consideration, held not; for the original mortgagee ought not to be entangled with any questions that might arise among subsequent mortgagees, for the mortgagor could not hurt him by playing his right into other hands, nor is there any precedent where such a redemption was ever allowed. 12th Dec. 1739, *Titley* v. *Davis*. Per Lord Chancellor. *Ibid.* "If a man mortgage all his estate to one person, he may, notwithstanding, split it into ten puisne mortgages more. Now, if all these subsequent mortgagees should have a right to redeem, on payment of proportionate contributions, it would be impossible for the first mortgagee to come at his right till all those proportions are settled, which may, and generally does, take a great deal of time, and often produces trials at law; and after all there must be so many different redemptions, and times given for them, (either half years or quarters,) before he can come at his money, or a foreclosure, which appears at first sight to be very inconvenient, and would much invalidate the credit of this kind of security."[1]

In the result, Sentopersaud's interest in the land being out of the question, though Sitaub Cower, his widow, having assets, might be liable, out of those assets, for the debt of her husband, and Saumchern's interest in the land not having been duly bound, so far as it appeared to the Court, by his widow, only, joining in the mortgage of his moiety, though she herself, by so joining, had made herself answerable for the debt; the decree was taken against her for the money due, together with the others, and was only given for sale of Samuel Doss's moiety of the land; and this is warranted; for if there be many incumbrancers, some of whom are not made parties to a bill of foreclosure, yet the plaintiff may still foreclose such defendants as he shall have brought before the Court; *Draper* v. *Jennings*, 2 Vern. 518; but the others will not be bound by the decree; *Sherman* v. *Cox*, 3 Ch. Rep. 84.

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[1] 15 Vin. Abr. 447. marg. note.

No. LXV.

SHAIK BUXOO AND OTHERS

versus

SHAIK JUMMAL AND OTHERS.

Sittings after 2d Term 1817.

A BILL was filed by the plaintiffs, the children of Kyroola (for many years the Sirdar butcher of Calcutta) by Chaundoo, his second wife, against Jummal, the surviving eldest son (after the death of his eldest brother, Leeshurry) of the same Kyroola, by Gunda, his first wife, and against others, the brothers and sisters of the said Jummal, for an account and partition of the real and personal estate of the said Kyroola; which estate, upon the death of the said Kyroola, was alleged, and shewn by evidence, to have come first into the hands of the said Leeshurry, his eldest son, and to have been held by him for several years, and on his death to have come into the hands of Jummal, the brother of Leeshurry of the whole blood.

The principal defence set up by the defendants was, that the property which came into the hands of Jummal, upon the death of his brother Leeshurry, had been acquired in whole, or at least in the greater part, by Leeshurry himself, who had continued the trade of a butcher, which he had also exercised on his own account, it was said, before his father's death, or had come to the said Leeshurry from his mother Gunda, and not from Kyroola the father.

Upon the hearing in a former term certain issues were directed for the purpose of ascertaining the facts from whom the property had been derived through Leeshurry to Jummal, and also the amount of such property, if found to have been derived from Kyroola, which issues now came on to be tried, and evidence was heard at great length for several days. In the course of the trial the following question became material, which was put to the *Maulavís.*

Q. If a Musulmán die without issue, having real and personal property, and leaving brothers and sisters of the whole blood, and other brothers and sisters of the half blood, by the same father, do the brothers and sisters of the half blood succeed to the inheritance, &c., together with those of the whole blood?

A. The brothers and sisters of the whole blood succeed to the entire

property, excluding those of the half blood, though children by the same father.

In the result the Court found the issues in substance for the plaintiffs, that a considerable personal estate, and all the real estate, had been derived from Kyroola, through Leeshurry to Jummal.[1]

NO. LXVI.

DOE DEM. RAMANUND MOOKOPADHIA
versus
RAMKISSEN DUTT.

25th June 1817.

THIS was an ejectment brought to recover an upper-roomed brick-built dwelling-house, and four *Cottahs* of land, at Burra Bázár, in Calcutta.

The circumstances of the case were very complicated, and the evidence went to great length, and was full of contradictions. My own opinion[2] on the whole was, that the title of the lessor of the plaintiff, which was founded on a deed of gift from one Pooraney Dossey, was fraudulent in fact as well as in law; but so much only of the outline of the case is here stated as is sufficient to render intelligible the questions put to the Pandits, and their answers.

The premises in question were part of a joint Hindú estate which was owned by four brothers, Noyon Shew, Gurreeb Shew, Hunynarain Shew, and Bisnoram Shew.

Pooraney, the grantor, was the surviving widow of Noyon Shew.

Gurreeb, who survived all his brothers, left a widow named Sootee Kaur; and Hunynarain and Bisnoram also left widows surviving them at the time of this transaction. A son of Gurreeb and Sootee had survived his father two years, and died.

All the four widows lived together for a time, at first, and for a short

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[1] See *infra* No. LXX. for other points raised at the trial of this case, on which the *Maulaví* gave answers.

[2] The reader will perceive that this is not a report of a decision in a case, but merely a history of the facts, together with the opinion of the learned Chief Justice and the *Vyavashtas* of the Pandits.

period, on the premises in question; but they shortly after resided altogether for a year, or thereabouts, in a new house, part of the joint estate in Jurasanko, in Calcutta, till disputes arose concerning their shares of the estate.

In December 1796 Pooraney filed a bill for an account and a partition, and a second bill for the same purpose (the first not having been proceeded upon) in April 1799, to which an answer was put in by Sootee Raur and the other widows: there was a bill of reviver filed in November 1811, and an answer put in in March 1812, and in May the bill was dismissed with costs. On the 19th August an order for sale was obtained of the premises in question, for the payment of those costs; and on the 3d September an actual sale of them was made by the Sheriff, under which the defendant claimed from the immediate vendee of the Sheriff, who had had notice of the lessor's claim at the time of the sale; and in December 1812 a new bill was filed for the same premises in the name of Pooraney Dossee, which was still pending. During the period of the sale to the defendant and the bringing of this ejectment, which was above four years, the defendant had expended a large sum of money in the improvement of the premises by building.

There is a difficulty in stating when the deed of gift under which the lessor claimed was really made, because, though the deed which was produced was dated in February 1208, or in the Bengal year 1214, yet Pooraney herself, who was examined, admitted that a prior deed of gift of the same premises had been made by her to the lessor several years before; and all the concomitant circumstances of the execution of the deed of 1214, as proved by the subscribing witnesses, were stated by her as having actually passed at the execution of the prior deed, and not at the execution of the deed in question, of which she gave a different account, stating that it was executed by her at the request of the lessor, who stated that the prior deed was lost. This was one of the gross contradictions in the case.

The witnesses in general described the deed of gift as made in *Bikaputra*, after certain ceremonies performed by the lessor, the grantee, who was a young Brahman whom the grantor, Pooraney, had partly brought up in her house, and was willing to have adopted, so far as the laws of Cast could admit: such laws, however, would not admit of

such an adoption of a Brahman by one of the Sudra Cast, like Pooraney.

At the time of the deed of gift, and afterwards, no change of possession took place: Pooraney still continued to live in the house, as she had done before, though some of the witnesses distinguished by saying that she only lived in a corner of it which she had reserved for herself.

The rents of the other parts had, before the gift, been received in general through the hands of the lessor, who had been bred up in the house as a servant; and though an attempt was made to shew a distinct receipt of rent by the lessor, after the grant in 1214, yet it was very slight and unsatisfactory for such a purpose, and, to all outward appearance, there was no difference.

It appeared to me that the sole purpose of the conveyance was to cover the property, after the revival of, or upon the determination to revive (if there really were two deeds), the suit in 1811 in case of an adverse event, which had actually happened; that the grantor had no right to dispose of the property beyond her own life, even if it had been regularly partitioned to her before; and that there was no real intention in the parties to convey it away from her in her lifetime, but only that the lessor might keep it, if he could, after her death, which would be in fraud of the heirs of her husband, for whom she had no concern. That the property was actually in litigation at this very time, and could not be thus withdrawn from the orders of the Court by one of the litigant parties; and that the subsequent bill filed in December 1812, which was after the supposed grant, and after the Sheriff's sale, which bill was filed through the medium of the defendant's brother, and in connection with him, in the name of Pooraney, affirming the title to be in her, was strong presumptive proof of the fraud.

The following questions were propounded to the Pandits in the course of the cause, and their answers, as stated, given in Court.

Q. Is a grant to a Brahman in *Bikaputra* good?

A. A grant to a Brahman is good: a grant in *Bikaputra* is all illusion.

Q. Can a widow grant away to a Brahman the real estate of her husband, who has left no children?

A. She cannot grant the whole, but she may grant to him a small part of it as charity.

Q. Can a widow make a grant to a Brahman to defeat the rights of her creditors?

A. Such a grant would be good against the creditors.

Q. Can a Hindú agree to sell his estate, and receive the consideration from a purchaser, but, before actual conveyance, convey the same to a Brahman?

A. He cannot. If a debt had been contracted in respect of the land, it could not be granted to a Brahman.

Q. Does that principle extend to grants to others as well as to Brahmans?

A. It extends to all.

Other questions were afterwards put to the Pandits, to the following effect:—

Q. Has a mother, who succeeds to a family estate upon the death of her son, more power to dispose of it than if she had had no son?

A. A mother who succeeds as heir to her son has no more power over the estate than she would have if she had not any son.

Q. Is a grant by a widow of her husband's land in perpetuity good even for her own life?

A. She can only convey what the law gives her; and if she convey more, the deed is an absolute nullity, unless the deed be made by consent of those who by law are to succeed to her.

Q. Can she give all her life estate, or only a part?

A. She cannot give all she has, for that would leave her without support.

Q. Can the estate be sold for her debts?

A. If the debt be contracted for her honour or support, or to support her estate, or for costs, the whole may be sold, otherwise she must go to gaol. But a woman cannot make such a gift as this (to a Brahman), or any gift at all of all her estate, nor any gift of an estate which is in litigation, or if it be even in dispute for a division included in the suit: such a gift would be fraudulent, and it makes no difference that it is given to a Brahman for the good of her soul.

Q. Can the grantor of land continue in possession of it as before, without affecting the validity of the grant?

A. The making a gift of property in land, and remaining in pos-

session of it afterwards, is clear evidence of fraud, and avoids the grant.

The majority of the Court, upon some of the answers first given by the Pandits, would have given judgment for the lessor of the plaintiff, but on the latter answers they suspended execution.

The cause was not heard of again in Court; but the Pandits afterwards expressed their desire to answer the questions propounded with the authorities with more deliberation; and in October 1817 I received from Mr. Smith, the second interpreter of the Court, the following copy of the questions and answers as made out by the Pandits themselves, in the original Bengálí, together with his translation of them.

Q. A person dying, not leaving a son, grandson, or great-grandson, but a widow, him surviving, who succeeds to and inherits his real and personal property?

A. The widow.

Q. The said widow having succeeded to, and possessed, the real estate of her deceased husband, what is her power in the treatment of it in regard to a gift, sale, or mortgage?

A. She, during her life, enjoys the rents and profits of the said real estate of her deceased husband. She cannot make a gift, a sale, or mortgage of the same at pleasure and without restriction, but can make a gift of only a part thereof, proportionate to its extent, for her husband's *Shrád*, and other religious rites, and for the performance of incumbent religious duties and vows. She can likewise mortgage or sell the said estate for the support and preservation of her life. Such gift, mortgage, or sale, as above, is valid.

Q. Should the said widow reserve but a small portion of the said real estate, and make a gift of the rest, is the gift valid?

A. It is not; but if she, with the consent of those who are legally to succeed to the estate after her death, make a gift of the whole, or a sale thereof, such gift or sale is valid.

Q. If the said widow make a gift of a part, or the whole, of the rents and profits of her deceased husband's real estate, is such gift valid?

A. The gift is valid during her life.

Q. If the said widow make a gift pursuant to the *Shastra*, and is in debt at the time of making such gift, is it valid?

A. It is.

These answers are agreeable to the Dáyabhága, and have and do govern the decisions in Bengal.

Q. Can a widow sell or make a gift of her entire life interest in the whole of her deceased husband's real property?

A. The widow can sell or make a gift of her life interest of possession and enjoyment in the whole of her husband's real property. She can only make a sale or gift pursuant to the *Shastra*, and in no other manner. The person holding under a sale or gift from the widow can transfer his or her right of enjoyment and possession by sale or gift to another, which sale or gift is only to endure and operate during the life of the widow, beyond which the donee or feoffee can do no act of ownership.

N. B. These answers do not bear on the fraudulent circumstances of this case, nor upon the contradictions in the evidence.

No. LXVII.

UPON THE PETITION OF KERAMATUL NISSAH BIBEE.

24th December 1817.

THE question in this case arose upon the validity of the will of a Musulmán, whereby he had bequeathed his property in different proportions between his relations, repugnant to the Musulmán law.

EAST, C. J., before whom this application was made in chambers, referred the question to a learned *Maulaví* of the Court of Sudder Dewanny Adawlut, to declare whether, by the Muhammadan law, a Musulmán has the power of giving, by will, his property to such of his family, and in such proportions, as he pleases, and whether he may omit one or more of them altogether in the sharing of his property.

The *Maulaví* of the Sudder Dewanny Adawlut conferred with the principal *Maulaví* of the Supreme Court, also a very learned man, and both concurred in the following answer :—

A Musulmán may freely, by his will, give his property to strangers; but to his relations in blood he has no occasion to bequeath any thing, for they, the relations, are to have their respective shares according to

the Muhammadan law, as it is mentioned there. And if a man disposed of his property to his heirs and relations, to one more and to another less, or if the testator omit any of his relations, and after his death the heirs and relations agree to the bequests made, the will remains valid; otherwise the will is only valid for the bequests made to the strangers, and invalid for the heirs and relations of blood, who are to receive their respective shares according to what is directed by the Muhammadan law.

The *Maulaví* of the Supreme Court, who was present before EAST, C. J., in Chambers, in answer to a question how the case would be if the man had two sons, one of whom was of merit, and the other of demerit, and that he wished to favour the one beyond the other, said that the man might dispose of his property how he pleased in his lifetime, and give the whole to the meritorious son, but he could not vary the legal proportions between them by his will.

No. LXVIII.

CHISHOLME
versus
BRUCE.

31*st October* 1817.

Fergusson, A. G., moved to take out sequestration against the defendant's effects in the hands of his agents, to enforce appearance to this action, which was brought by his co-surety in an administration bond to recover a moiety of the sum decreed against him for the default of their principal.

The defendant had been absent in England about three years, but the cause of action had arisen on the judgment within two years, and therefore within the jurisdiction of the Court under the 13th Clause of the Charter. The writ of sequestration, after a return of *non est inventus*, is given by the 15th Clause. There was an affidavit of the plaintiff verifying his demand, and the letters were produced which had passed between him and the defendant, and the defendant's agent in Calcutta.

The Court, on review of the Clause referred to, gave a rule to shew

cause, to be served on the defendant's agents, why sequestration should not issue unless an appearance were entered. An appearance was afterwards entered, and the plaintiff recovered Rs. 30,000, which was nearly the half of what he had paid, and which was all that he could claim or recover by judgment in India against an absentee in England.

No. LXIX.

HEMMING ADMINISTRATOR OF HAWKEY *versus* KIDD AND ANOTHER.

4th November 1817.

Fergusson, A. G., and *Hogg*, obtained, on Thursday the 30th October, a rule to shew cause why the judgment entered up in this case should not be set aside, with all subsequent proceedings, for irregularity, there having been no four-day rule given for signing judgment.

At the trial of the cause at the Sittings after the last Term, a verdict, or interlocutory judgment, had been taken by the plaintiff for Rs. 140,330, the sum declared for, subject to the award of an arbitrator, to whom the account between the parties was referred, under a rule of Court, the Court reserving to itself the question of costs. The arbitrator by his award, made on the 21st October last, had reduced the plaintiff's demand to Rs. 79,117 . 9 annas, 3 pice.

On the 23d October in the present Term the plaintiff's counsel obtained a rule to shew cause why the judgment should not be entered up for the reduced sum, and why the defendants should not pay the costs of the action. Cause was shewn against that rule on the 28th October, when it was made absolute as to the sum for which the judgment was to be entered up, but without costs. Upon which judgment was signed on the 29th, and a writ of execution issued thereon.

It was contended by *Fergusson, A. G.*, that as the sum for which judgment was entered up was not recognized by the Court till the 28th, and that till that day the final interlocutory judgment of the Court as to costs was uncertain, it was to be considered the same as if the Court had suspended giving their judgment in the case till the 28th October,

when, by the 48th Rule on the plea side[1], no judgment could have been entered on the Roll till after the expiration of a four-day rule, nor writ of execution be issued thereon. He referred to *Lee* v. *Lingard*, 1 East, 401, and *Hayward* v. *Ribbons*, 4 East, 310, in support of the rule.

Compton and *East* now shewed cause, and contended that the defendants had had the full benefit of the four-day rule upon the first rule obtained for shewing cause why the judgment should not be entered up for the sum awarded, &c., and cited *Borrowdaile* v. *Kitchener*, 3 Bos. and Pull. 244, to shew that judgment might have been entered up for the sum awarded without applying to the Court.

The Court, after hearing the defendant's counsel in support of the rule, on the same ground as before stated, were satisfied that they had, in fact, had the benefit of a four-day rule by the rule to shew cause why the judgment should not be entered on the Roll for the sum awarded, when they would have been at liberty to offer any matters in arrest of judgment against that rule, which was even more beneficial than the common four-day rule, the latter being only directed to be given as a notice to the party that judgment will be entered up if within those four days they do not shew cause to the Court against it.

Rule discharged.

No. LXX.[2]

SHAIK BUXOO AND OTHERS
versus
SHAIK JUMMAL AND OTHERS.

24th July 1817.

In the course of this cause other questions were put to the attending *Maulaví*, to which, on this day, the following answers were returned:—

1st, As to the shares of the real and personal estate divisible amongst the family of the deceased.

A. These shares depend upon the number and connection of the relatives; and a mistake was made by the *Maulaví* as to these in the first instance, which was afterwards set right, and the decree made in the legal proportions fixed by the Muhammadan law.

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[1] 2 Sm. and Ry. 91. par. 9.

[2] See *supra*, No. LXV.

2d, *A.* The widows take their portions severally to them and to their heirs absolutely.

3d, *A.* The daughters also take their shares absolutely the same as the sons do; and it makes no difference either in interest or quantity whether or not a daughter is married.

The following question was also put and answered:—

Q. Is real estate, acquired out of the personal funds of the intestate after his death, subject to the same division as real estate at his death?

4th, *A.* It is subject to the same division, but the title to the land remains in the purchaser, though he is accountable for the shares of the others, and the land is not to be estimated by its present value, but by what he paid for it at the time.[1]

Other questions were also put, and answered as follows:—

5th, *A.* Personal property, which remains such, is subject to the same division as the other.

6th, *A.* If a person be appointed a manager of a family, by the election or consent of the other members who are interested, or appointed head of the family by the preceding head of the family, there, if he purchase lands out of the joint personal property, the land is to be valued as at the time of the division, and he is to account for the rents and profits also; and whatever advantage he may make of the money he must account for it. But if a person by fraud comes into the possession

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[1] Note by Sir E. H. East.—The decree did not adopt the distinction aimed at by this answer, the Court thinking that the defendant Jummal ought not to profit by his declared breach of trust and fraudulent application of his brothers' and sisters' shares to his own private use, but held him liable to account as trustee for them in the application of their money, which, it was admitted, he would have been liable to if he had purchased for them as well as for himself at the time. The decree directed the costs &c. to be paid, in the first instance, by the sale of the real estates, whereof Shaik Kyroola died seised &c., and of that which was purchased of Shaik Leeshurry with the money of Kyroola, and the residue to be divided in the shares as allotted by the law officer; and it was referred to the Master to take an account of the rents, issues, and profits of those estates, and also of the personal estate of Kyroola which had come to the hands or possession of the defendant Jummal, and all advantages, profits, emoluments, and interest which had accrued or resulted or had been derived or received by Leeshurry or by Jummal from the possession thereof, excepting only such interest as might have been derived or received by Leeshurry or Jummal from loans of money made to Musulmáns, making to the parties accounting all just allowances.

of personal property belonging to several, and he purchase land with the said personal property, he is then subject to account to them for their respective shares, according to the value only of the original purchase.

7th, *A.* If a Musulmán have illegally taken interest from another Musulmán for the use of joint property, he must account for it to the rest, if they choose to take it; but if the interest be received from any other than a Musulmán, then he must account for it to the rest.

8th, *A.* If the interest appear to have been taken by a Musulmán from a Musulmán, the *Kází* would punish the taker, and cause the money to be returned to the Musulmán (or to his heirs in case of his death) from whom it was taken, and if none were to be found, the *Kází* would keep it, and give it away in charity.

No. LXXI.

NURSINGCHUND SEAT AND OTHERS

versus

KISTNOMOHUN SEAT AND OTHERS.

23d July 1817.

THIS cause came on to be argued on exceptions to the answer.

The bill stated that Junnardun Seat, a Hindú, the ancestor of the plaintiffs, died in 1118 B.S. (A.D. 1711, 1712), leaving three sons, Bustom Doss Seat, Manickchund Seat, and Sobuchund Seat, and seised of real and personal estate to a large amount, which descended to, and was possessed by, his sons, undivided during their lives; that Manickchund died in 1152 (1746), leaving three sons, Goculchund, Choyluchurn, and Petumber, who succeeded to his share; that Sobuchund died without issue in 1159, leaving a widow, Droopuddy, who died in 1196; and Bustom Doss also died in 1159, leaving two sons, Nemychurn and Gourchund, who inherited their father's share; that Nemychurn died in 1170 without issue, but leaving a widow, Goonomony, who died in 1199; that Gourchund died in 1189, leaving no male issue, but leaving Ramoney Sytaney, his second wife, and three daughters, him surviving; that the said Ramoney Sytaney possessed herself of his property till her death in 1219; that the three daughters married certain persons called Bysack (some of the defendants); that Goculchund, eldest son of Manickchund, died in 1153, without issue; that

Choyluchurn, the second, also died in 1153, without issue; that Petumber, the third son of Manickchund, died in 1199, leaving two sons, Gopeynaut and Roopchund, who became possessed of his undivided share of the joint property; that Gopeynaut died in 1203, leaving Nursingchund (plaintiff), his only son; and Roopchund died in 1206, leaving the other plaintiffs, his sons, who claimed one-third of the undivided estate of Manickchund, as also one-third of Sobuchund's share, and one-third of the share of Bustom Doss, subject to the life interest of the daughters of Gourchund, who had no issue. The bill then charged, that Ramoney Sytaney, on the death of Gourchund her husband, possessed herself of the joint personal estate, and took advantage of the distressed situation of the plaintiffs after the death of Petumber their grandfather, to make them enter into a deed of composition, and convey and exchange certain lands to her, in payment of certain demands in account which she set up against Petumber, and to make them execute a release, all which they proceeded to impeach and prayed to be set aside, and that she should render an account of the real and personal estate. And then the bill suggested that the defendants pretended that the plaintiffs had no claim to any part of the real and personal estate, because Ramoney Sytaney adopted the defendant Kistnomohun, which adoption they deny, or that it had any effect by the Hindú law; but if he had been adopted, that they would still have a right to share with him the real and personal estate. The general prayer of the bill was for an account of the rents of the real estate and of the personal estate, and to set aside the conveyance and release, &c.

The defendant Kistnomohun, by his answer, swore that he had no knowledge of the estate of Junnardun possessed by or descended to his sons, save as appears by an answer filed in the Court by Gourchund, the grandson of Junnardun as aftermentioned; and so referred as to all the material facts of possession of the estate to the said answer, without adding or denying his own belief of the facts therein stated, answering other matters in the usual way, and rested on the amicable allotment and division of Ramoney Sytaney, wife of Gourchund, and Petumber, the third son of Manickchund, and on the adoption of the defendant Kistnomohun as the son of Gourchund, by his widow

Ramoney Sytaney, in consequence of a power delegated to her by Gourchund.

The complainant took exceptions to the answer: 1st, That the defendant had not, to the best of his knowledge, remembrance, information, and belief, answered whether, upon the death of Ramoney Sytaney, he, with the other defendants, did not possess themselves, to the exclusion of the complainants, or how otherwise, of the whole of the ancestral undivided personal estate in the bill mentioned, amounting to two lacs, or some other, and what amount.

2dly, That the defendant had not, by his answer, to the best of his knowledge, belief, &c., set forth a particular, or any account of the personal estate and property in the bill mentioned, and of the interest and proceeds thereof, and of the rents, issues, and profits of the real estate, &c., come to his possession, &c.

3dly, Nor to the best of his knowledge, belief, &c., set forth whether Junnardun Seat did not die seised and possessed of considerable real estate.

And there were several exceptions of the like nature as the last, which went to except to the mode of answering by simple reference to the answer of Gourchund, and negativing any other source of knowledge or belief.

The avowed object of the defendant was to avoid entering into an account of the real and personal estate until the question of his adoption was first disposed of by the trial of an issue, and also the question whether or not there had been a binding division of the estate, and therefore

Compton, for the defendants, contended that the Court should direct the trial of those issues in the first instance; because if both of them were found for the defendant Kistnomohun, then the complainants would have no right to an account; and if either of them were found against him, he was willing to account. But it was admitted, that if, at all events, he was bound to answer fully to the whole bill, the answer was defective in not answering in terms whether he had possessed himself of any part of the joint estate of Junnardun. He referred to the suit, before the year 1193, between Petumber and Gourchund, to which the latter had put in the answer referred to in the present defen-

dant's answer; and having died two years after that answer was put in, his widow, Ramoney Sytaney, had come to a settlement with Petumber in 1193 (about six years after Gourchund's death), before the adoption of Kistnomohun. That upon the basis of that agreement an actual division was made between her and the sons of Petumber after his death, which settlement and division was confirmed by the complainants themselves in 1207.

Fergusson, A. G., and *Macnaghten*, in support of the exceptions, observed, that the defendant did not deny the leading fact that there was a joint estate, but answered that he did not know, nor from any documents in his possession, &c. had any reason to believe, that Junnardun had any estate, &c., save and except from the answer of Gourchund to the bill filed against him by Petumber, and the answer, such as it was, did not set out the personal estate, &c. That if the defendant had intended to rely on any fact, such as his adoption and the former settlement and division, he could only do it, if at all, by plea; but that if he answered, the rule was operative that he should answer fully; and they cited 15 Ves. 372; 16 Ves. 382; Ball and B. 324; Cooper, 312; referring to 11 Ves. 283. 303.

The Court were of opinion that the exceptions should be allowed; for that if the defendant do not plead any facts, or circumstances conducive to one fact, which he relies on as sufficient to dismiss the bill without answering fully or going to an account, but chooses to answer, he must answer fully, and give the account required, though he may state such facts in his answer as, if found for him, would have been a defence against rendering the account. And in this case the taxed costs of all the exceptions were allowed, according to the general practice, though many of the exceptions taken were merely consequential upon the first.

VOL. II.] [PART II.

AN

ANALYTICAL DIGEST

OF ALL

THE REPORTED CASES

DECIDED IN THE

SUPREME COURTS OF JUDICATURE IN INDIA,

IN THE

COURTS OF THE HON. EAST-INDIA COMPANY,

AND ON APPEAL FROM INDIA,

BY HER MAJESTY IN COUNCIL.

TOGETHER WITH AN INTRODUCTION,

NOTES, ILLUSTRATIVE AND EXPLANATORY, AND AN APPENDIX.

BY

WILLIAM H. MORLEY,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW,

MEMBER OF THE ROYAL ASIATIC SOCIETY, AND OF THE ASIATIC SOCIETY OF PARIS.

"IF IT BE ASKED HOW THE LAW SHALL BE ASCERTAINED WHEN PARTICULAR CASES ARE NOT COMPRISED UNDER ANY OF THE GENERAL RULES, THE ANSWER IS THIS: THAT WHICH WELL-INSTRUCTED BRAHMANS PROPOUND SHALL BE HELD INCONTESTABLE LAW."

MENU, B. 12. v. 105.

IN TWO VOLUMES.

VOL. II.

CONTAINING THE APPENDIX.

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Blackstone's Commentaries, Introd. Sec. 3.

No. LXXII.

HUNTER
versus
HARRIS

11*th November* 1817.

THIS was an action on the case, in which the declaration stated that the plaintiff was possessed of a ship called the Bombay Merchant, lying at anchor in the River Hooghly, at Calcutta; and the defendant was the master of another ship called the Mentor, lying in the River Hooghly aforesaid, and had the care, conduct, management, government, and direction of the same; yet the defendant, not regarding his duty in that behalf whilst he was such master of the said ship Mentor, and had such the care and conduct &c. thereof, as aforesaid, on the 3d July 1817 so negligently, carelessly, and unskilfully steered, and caused to be steered, managed, and directed the said last-mentioned ship in the said river, that the said ship, being under the care &c. of the defendant as aforesaid, then and there, by reason of the negligent and unskilful steering and management &c. thereof, with great force and violence ran foul of and struck the said ship of the plaintiff, and thereby greatly damaged and injured the same &c., and then assigned special damage by the loss of a cable and anchor &c. carried away.

At the trial of the cause the question came simply to this; viz. whether, by the custom of the Port of Calcutta, founded upon the known necessity of providing against the violent floods and freshes in the river at certain periods of the year, including the beginning of July, when the damage in question happened, it was a proper precaution of security for a vessel of a certain size, such as the defendant's vessel was, viz. of about 400 tons and upwards, when moored in the river of Calcutta, not only to have two anchors out, but to have a third anchor and cable ready bent upon deck, in order to be let go immediately in case of necessity.

Several officers of the Honourable Company's Marine, and captains of ships, who had navigated in the Hooghly for nearly twenty years past, and also merchants conversant with the usage of the port, all swore that such a precaution was always deemed prudent and necessary, and was generally though not always taken; that, without such a pre-

caution, a ship was not considered to be reasonably secure, though sometimes accidents happened from the violence of the flood and sudden freshes of the river in the rainy season notwithstanding that the precaution was taken.

Upon the present occasion it appeared that every thing was done by those on board the defendant's vessel (for he himself happened to be on shore on the night of the 3d of July when it happened), after the vessel had broken from her two anchors and was drifting down through the shipping towards the plaintiff's vessel, which the violence of the stream and the darkness of the night would admit of, in order to avoid the danger; and therefore the question came at last to turn upon the want of the previous precaution, which would have afforded an additional chance of escaping the damage.

It further appeared that the defendant was a stranger to the port, this having been his first voyage to Calcutta; but there was also evidence of his having been advised of the prudence of having a third anchor and cable ready bent upon deck, when, or soon after, he was moored in the river; and that he had said he would be so prepared, but the necessity of this precautionary measure was not stated in the printed rules of the port, which were confined to other matters.

The Court, upon the undeniable evidence of the general usage and understanding of all experienced persons conversant with the navigation of the port, in support of the reasonable necessity of the precaution, and its actual adoption and use by the generality of ships' captains, who considered a ship as unsafely moored without it, gave a verdict and judgment for the plaintiff, with Rs. 1600 damages, and also costs.

No. LXXIII.

DOE DEM. SIBNAUTH ROY
versus
BUNSOOK BUZZARY.

27th January 1818.

THIS was an ejectment brought to recover a *Cottah* of land in Burra Bázár in Calcutta.

It was a question of encroachment between the lessor of the plaintiff and the defendant, whose premises adjoined each other; and the lessor

laid claim to the *Cottah* in dispute as part of 1 *Bighá* 1 *Cottah* which he had purchased from Toolsey Uraney, the widow of Jugdeen Raney, to whom it had formerly belonged, and who was stated to have died without heirs, leaving no issue, but only his widow Toolsey Uraney; whereupon a question arose whether the widow of a person dying without heirs could convey his estate, and the question was put to the Pandit.

Q. Can a widow, without issue, and no heirs known of her husband, sell his land so as to convey it beyond her own life?

A. If there be nobody but the King who can claim it, she may sell it.

Note by Sir E. H. East.—I had some doubt about this answer, as had the rest of the Court: it did not seem to be compatible with the answer given by the Pandits in the case of *Gopeymohun Thakoor* v. *Sebun Cower*[1], or with the law as laid down in the Dáya Bhága, c. xi. s. i. 5. 37. 48. s. vi. 27. 34.; and I afterwards communicated my doubts to the Pandit on another day in Chambers, who explained it by saying that the widow's conveyance would be good, unless the King interfered; that is, it would be good as against all strangers, but not as against him. Perhaps it might stand on this ground, but there was no necessity to decide the question in this case, as the parties agreed to refer all matters in dispute to one Roopchurn Roy, with costs in his discretion.

No. LXXIV.
HAYES
versus
GRAHAM.

29th January 1818.

Commodore Hayes brought this action for a libel against Captain Graham, of the Honourable Company's ship William Pitt.

The libel was contained in three certain letters, written by the defendant, dated the 10th Nov. 1817; one of them directed to the Secretary of the Marine Board, another to the Secretary of the Board of Trade, of both which Boards the plaintiff himself was a member, and the third to the acting Secretary of Government.

[1] See *supra*, No. LXIV. 1st Answer of Pandits, p. 110.

The Court held, first, that neither of the officers of the Boards who had been respectively served with *subpœnas duces tecum* were bound to produce the original letters addressed to these Boards in their public functions without the consent of Government, but that they would take the assent of the Board as the assent of Government; that this was a protection due to persons who stated their own or general grievances to Government with a view to redress, and Government would be able to judge whether the case was such as claimed their protection. They also held, that where the principal member of the Board, Mr. Udney, on being informed that the Secretary had been served with the *subpœna duces tecum*, considering that he had no right to withhold the paper, said at the time that it must be complied with; in consequence of which the Secretary brought the letter into Court: yet as Mr. Udney himself, upon being examined in Court by the plaintiff as to his consent, explained the circumstance under his misapprehension, and declared that if he had an option he should not produce it, the paper could not be read under these circumstances of surprise and mistake. However, while this discussion was going on, which took some time, the plaintiff obtained an order of the Vice-President in Council for the members of the Board of Trade and Revenue to produce the letter, and the letter was accordingly read. The letter purported to convey a complaint from the defendant to the Government of having had several of his seamen inveigled to desert from his ship, and attributed the fact to the procurement of the plaintiff; but though the language of the letter was flippant, and reflected injuriously on the plaintiff, yet the avowed object of it was to get redress, and obtain back his seamen, who, in fact, had deserted at two several times, and had been, in fact, received on board one of the Honourable Company's Cruisers, over which the plaintiff had an official controul; and the circumstance of the defendant having sent the three letters on the same day to the different departments of Government was shewn to have arisen from the question between the two Boards as to which had the duty imposed upon it of giving the required redress, and from the circumstance of the plaintiff being a member of both the Boards, which suggested the third letter to the Secretary of the General Government.

Spankie, A. G., for the defendant, contended that the action did not

lie, on the ground that the grievance complained of was true, and that they were written for the purpose of obtaining redress from those to whom they were addressed, and who had, or were believed to have, the power of giving it, which rebutted the common implication of malice, and cited 1 Saund. 130; Andr. 229; Holt, 311; and 4 Bac. Abr. tit. Libel.

The Court, after hearing counsel for the plaintiff on this point, nonsuited the plaintiff.

No. LXXV.

DOE DEM. HENCOWER BYE AND ANOTHER *versus* HANSCOWER BYE AND ANNUNDO BYE.

9th February 1818.

THIS was an ejectment for two messuages and some land in Baustollah Gully in Calcutta, which had been the self-acquired property of a dancer and prostitute, of the name of Mollut Bye, who died without issue, and was a Hindú.

The case set up by the lessors of the plaintiff was that of adoption of them by Mollut Bye, particularly that Hencower Bye had been bred up by Mollut from a child, and that Mollut had adopted her as her daughter, and had always called her such, and had entrusted her with the management of her family for many years past. Mollut was between eighty and ninety at the time of her death, about seven years before this action was brought, and Hencower was now about forty. It was suggested that the defendants meant to set up a will made by Mollut before her death, dividing her property into five parts, of which two parts were to be given to the two defendants, and the other three parts, two of them to the lessors of the plaintiff, of whom Hencower was one, and one Nabonhor the other, and the third to another person, but

Fergusson contended that if he could establish the adoption, it was not in the power of Mollut to dispose of the property from her adopted daughter Hencower, or from her other adopted daughter, the other lessor, if they were proved to have been adopted. Upon this point,

MACNAGHTEN, J., said, that upon the much contested case of Rajah Nobkissen's will, which was disputed between Gopeymohun Deb,

whom he had adopted as his son before he had any issue of his own body, and the present Rajah Raykissen, who had been born to him (Rajah Nobkissen) after such adoption, and in whose favour he had made a will, giving him the principal part of his property, the Supreme Court, after consulting all the principal Pandits in India, held, that Rajah Nobkissen, after having adopted Gopeymohun Deb as a son, could not devise away his share of the estate from him, and therefore Gopeymohun recovered from the Rajah Raykissen the half of the property, notwithstanding the will. An adopted son was considered in the nature of a purchaser for a valuable consideration, as he thereby lost his inheritance in his own natural family out of whom he was adopted. The above decision took place about the year 1800 or 1801.

In the present case, after much evidence had been gone into in order to shew that Mollut had always acknowledged Hencower to be her adopted daughter, and that she was always treated as such in the family from her childhood, though there was no evidence of any actual ceremony of adoption having been performed, and the lessors, who were living with Mollut as prostitutes, also appeared to have called her mother, and to have been called daughters by her; to make an end of the case the opinion of the Pandit in Court was taken, whether, by the Hindú law, there could be an adoption of a female heir, to which the Pandit answered that there was no such instance of the adoption of a daughter to inherit by the Hindú law.

Upon this the parties came to a compromise, and agreed to share the estate according to the terms of the instrument which the defendant set up as the will of Mollut.

But the Court gave judgment *pro formâ* for the defendants, with costs, as rejecting the adoption without examining into the validity of the supposed will.

No. LXXVI.

LEMONDINE, EXOR. OF WILLIAM WHITE

versus

SARAH ROCK AND EDWARD WHITE.

Sittings after Fourth Term 1816.

THE bill prayed that the complainant executor might account before the Court for the estate, property, and effects, of his testator, come to his hands, &c., and pay the same into the hands of the proper officer of the Court for the benefit of those declared by the decree of the Court to be entitled to the same, and to be thereupon discharged from his trust, &c.

The testator's will of the 1st December 1814 was established, devising all his property to Sarah Rock (formerly White) and Edward White, the defendants, and it appeared that Sarah Rock's husband had not been heard of for fourteen years past.

The estate being small, instead of a reference to take an account, it was desired on both sides, and so ordered by the Court, to save expense, that the money acknowledged by the executor to be in his hands should be paid into Court; and the Court directed the Master to advertise, both in India and England, for Sarah Rock's husband to come in previously to her share being paid over to herself, and that it should be so paid to her if nothing appeared to shew that he was alive.

No. LXXVII.

REID

versus

MUTTOORMOHUN SEIN AND ANOTHER.

17*th March* 1818.

Fergusson moved, on a former day, for a rule *nisi* for staying the plaintiff's action until he gave security for costs, on the ground that the defendants had before recovered judgment against him in the Supreme Court, and that he had evaded the process of the Court by absconding to Serampore, where he was residing out of the reach of the process of the Court.

Spankie, A. G., and *Compton,* now shewed cause, and stated that the plaintiff had considerable landed property, and other property, at Purneah, which would be liable to costs, being within the general

jurisdiction of the Court in the provinces; and therefore that he ought not to be debarred from his general right to sue as a subject of the King, without any such impediment. It was admitted, however, that he did not swear that he was a British subject of the King.

All the officers of the Court agreed that such property in the provinces belonging to a native subject suing in this Court might be seized and sold for costs.

The Court, however, ordered the rule to be made absolute, saying that the defendant had by law a right to take the person, as well as the property, of the plaintiff, for costs, if given by the Court; and that, though the plaintiff's property in the provinces might be liable for such costs, yet as he was not sworn to be a British subject of the King, and had absconded to the Danish settlement of Serampore, where his person was not within the reach of the Court's process, it was fit that he should give the security before he proceeded in his suit.

No. LXXVIII.

DOE DEM. BIBEE BUNNOO, WIDOW, HEIRESS, AND LEGAL REPRESENTATIVE OF MIRZAH EMAUMDEE *versus* MIRZAH AHMED ALLEE.

Sittings after Second Term 1818.

Fergusson, for the lessor of the plaintiff, stated the case to be as follows, viz.

That in February 1813 the lessor was married to Mirzah Emaumdee, who was taken ill at his house in May 1817, and the lessor being then pregnant, her husband desired her to retire to the house of her mother, where she had afterwards a son born, who died soon after his birth, and twenty days afterwards Emaumdee died, before the lessor returned to his house. That the defendant, who was the son of a slave girl who had been kept by Emaumdee, took possession immediately of Emaumdee's house, and ejected the lessor.

It appeared, however, by the plaintiff's own witnesses, that the defendant, though the son of Emaumdee's slave girl, had constantly, from his birth, which was nineteen years before this action was brought, been acknowledged by Emaumdee in his house as his son.

Whereupon the Court put this question to the *Maulaví*—

Q. Will the son of a Musulmán by a slave girl inherit to him as his son?

A. The son will be entitled, on the death of the father, to his proportion of the property as a son, if the father have recognized him as such in his lifetime.

The lessor then set up another case, and proved that at the marriage of the lessor and Emaumdee (whereat one Meer Peerbux acted as *Vakeel* for the bride, by the authority of her mother and friends) Emaumdee, who was of the sect of Sunníys, made a settlement in writing of Rs. 500 on her, which settlement, it was contended, gave her a lien upon the land to that extent; and further, that she was still entitled to her share of the whole estate of her husband, and had, therefore, an interest and estate in the land which she could recover in ejectment.

A question to that effect was accordingly put to the *Maulaví*, to which he returned the following answer—

A. Though a Musulmán die, leaving a son, the widow is entitled, and has an interest in the land, to the extent of her share, which in the present case is one-eighth; her marriage portion is first a debt on the person who succeeds to the estate, and after the debts are paid the division is made.

Spankie, A. G., on behalf of the defendant, proved a written instrument and contract of marriage, dated the 29th Safar in the year 1230 of the Hijrah (10th Feb. 1815), drawn up and executed in the presence of a number of persons (amongst others, of two *Kázís*) by Emaumdee, and by Meer Peerbux, the *Vakeel* of the bride on her behalf, by virtue of which she was to receive in value Rs. 500 in bar of her dower, and all claim on her husband's estate; of this Rs. 500 the lessor received at the time Rs. 205 in value, in jewels, and the payment of the remainder was to be defrayed during the marriage by the terms of the deed, by which also she was to receive maintenance from the son, the defendant, after her husband's death, if she behaved well, otherwise he was to remain master. It was also proved, that, after the execution of the deed, it was given to a certain person to get it sealed by the head *Kází* of Calcutta, who put it into Emaumdee's hands, for the purpose of getting it so sealed; but he, though applied to from time to time, put it off

until at last he and his wife quarrelled, when he said that it was of no use to get it sealed, and that he would pay the money that was due. He died, however, without having made such payment, and without getting the deed sealed. The authority of Meer Peerbux as *Vakeel* to the bride was also proved from the instructions of her father and mother, she being about twelve or fourteen years old only at the time of the marriage, and that the deed was drawn up by the consent of all parties.

Several questions arose which may be collected from the questions to, and answers of, the *Maulaví*, in this case.

Q. Is the seal of the *Kází* essential to the marriage contract or settlement?

A. It is not essential, it is only obtained to authenticate the contract more formally.

Q. Is a contract to bar dower good where the bride is an infant, or where she is an adult?

A. Though a bride, whether infant or adult, forgoes all right to her dower in the marriage contract, yet she cannot bar herself of her right to her share of her husband's property on his death.

Thereupon the defendant further proved the execution of a conveyance of his landed property by Emaumdee to his son, the defendant, (dated the 20th Asvina 1222, in the house of the principal *Kází*, and otherwise well authenticated) in the presence of many respectable Musulmáns. This took place about seven months after the marriage: the defendant was then about the age of sixteen or seventeen, living in his father's house, where he continued to live after the conveyance as he had lived before. There was some doubt at first whether the father had not collected the rents of a part of the property after the conveyance, but certainly the son had collected some rents afterwards.

This gave rise to several of the questions to the *Maulaví*.

Q. Can a husband bar his wife's claim to dower by a gift to his son in his lifetime of the property? and would such a gift be good without making over the possession of the land to the son?

A. The father may make a gift of his land to his son in his lifetime, being in health at the time he makes the gift, which will bar the wife's claim to her share of the land. A mere verbal gift is sufficient, if the son were only of the age of fifteen years, without any formal possession;

a writing, indeed, is not necessary in any case. But if he were of the age of seventeen the father should give him a formal possession; the father may then return and live with his son on the land. Where the gift is made before the son comes of age, the father need not give him formal possession after he comes of age. Neither does it make any difference if the father kept the title deed in his possession after the gift, or that the father carried on the rice trade at a *Golab*, afterwards in partnership with his son, as was the fact in this case, the rice *Golab* being one of the four houses, &c., conveyed.

Q. Would such a conveyance be good against the claims of the wife, if her husband had not paid her the whole of her marriage portion?

A. The claim of the wife to her marriage portion is merely a debt, and no real lien upon the ground; the claim is on the person only.

After these questions had been thus answered by the law officer of the Court present, it was represented to the Court that there was present in Court one Kází Abdul Hamíd, who was known to be a very learned Musulmán, attached to the Sudder Dewanny Adawlut; and therefore, for the further satisfaction of the Court on these points, the following questions were put to, and answered by, him—

Q. Will the gift of land by a father to his son in his lifetime exclude the widow from her claim on his property at his death?

A. It will.

Q. Will it do so without his putting his son into exclusive possession?

A. It will: the son continuing in possession with his father makes no difference.

Q. Does it alter the case if the father retain the possession of the title deeds?

A. It does not.

Q. Does it alter the case if the rents be collected by the son, and paid over by him to his father?

A. The son may do so if he choose; it makes no difference.

Q. Does it alter the case if the widow's settled marriage-portion has not been paid?

A. It makes no difference; she has no right to the land.

Finally the plaintiff was nonsuited.

No. LXXIX.

BAYLEY AND ANOTHER, EXECUTORS OF SISSON, *versus* ALEXANDER AND OTHERS.

1*st April* 1818.

THIS was an action upon a special assumpsit, and the declaration stated that on the 27th August 1817 Thomas Sisson was admitted a member of the Second Calcutta Supplementary Laudable Society, to hold a certain number, namely, eight shares on his life, for the benefit of his estate after his death, or of such person or persons as he might thereafter appoint by will or assignment, &c. And thereupon, in consideration that Sisson, at the request of the defendants, paid to them S. Rs. 1630. 14 annas, 8 pice, being the subscription and premium of admission required by the regulations, &c., and would perform all the regulations, &c., on his part to perform, and a promise that in the event of his life lapsing by suicide, or the hands of justice, no benefit should be derived from the funds of the Society by his estate or representatives; the defendants promised, in case of his death, except, &c., to pay him so much, &c. The declaration then averred his death, not by his suicide, &c., and the non-payment of the stipulated sum by the defendants.

It was admitted at the trial that Sisson had died by laying violent hands upon himself upon the 28th February last; but it was also admitted that he was *non compos mentis* at the time, and the question was whether this was to be deemed suicide within the meaning of the regulations established by the Society.

By the first Article the object of the Association was declared to be to provide a fund for the insurance of lives. By Article 4 the Association commenced on the 1st July 1817, and was to close on the 30th June 1818. Article 14 required that all applications for admission into the Society should be accompanied by a certificate of health, signed by a medical gentleman, and by an affidavit sworn to and signed by the person whose life was to be insured. Then it set out the form of the letter of application, inclosing the certificate of health, and the affidavit of health. The certificate by a medical gentleman stated—"This is to certify, that, to the best of my knowledge

and belief, T. S. is at this date (27th August 1817) free from any dangerous bodily complaint, and that, from my acquaintance with his constitution and general state of health, I consider him to be a good life." (Signed by the medical gentleman.) Such a certificate was obtained in this case; and the medical gentleman who signed it now swore in Court to his belief to the truth of it, though he stated his knowledge at the time that Sisson had been deranged, and had, in consequence, been sent to England, from whence he had then lately returned, and appeared to be quite recovered; next, by the form of affidavit referred to, Sisson swore—"To the best of my knowledge and belief the contents of the above certificate, as they relate to my present state of health, are true," &c. By Article 17 it was declared that no subscription on any life should be considered as entitling the party or parties concerned to benefit by the Society, until the life subscribed on should have been approved of by the Directors, the amount of the subscription and premium of admission paid, and the certificate of admission granted, &c., agreeably to the regulations. Then by Article 20 it was declared, in the event of a life lapsing by suicide or the hands of justice, no benefit should be derived from the funds of the Society by the estate or representatives of the deceased: but that this rule should not be understood as precluding a creditor who might have subscribed for his own security on the life of such deceased person, or to whom any shares in the Society might for that purpose have been assigned, from benefitting to the extent of the sum actually due to him.

Spankie, A. G., and *Hogg*, argued that the exception of suicide was to be taken in its legal and evil sense, and could not be predicated of an insane person; and that this was borne out by Coke, 3d Inst. 54., and by the writings of Johnson, Paley, and by Walker and the Encyclopædia; that if there were any doubt, the coupling it with the lapse of life by the hands of justice shewed that it was so intended by this Society, and the rule applied *noscitur a sociis*, 5 Ves. 401; the legal sense must prevail, if nothing appeared to vary it; and they contended that all the writers on the commercial law used the term suicide in the sense of crime. Besides, the exception in favour of creditors shewed that it was not the act itself intended to be excepted, but only the benefit of it to the criminal's representatives or estate.

Fergusson and *Compton, contra,* said that suicide only meant self-destruction, without any reference to intention or crime, as might be collected from Lord Coke, Blackstone, and the French Encyclopædia, and Dictionary of the French Academy; and it was in this generic and general sense that the Society used the term in their regulations: they intended only to look to the act, and to avoid all questions of this sort, knowing that insane persons have a peculiar tendency to suicide. The writers on crown law use the word in a criminal sense, because they are treating of crimes in general.

The Court were of opinion that the admission that Sisson was *non compos mentis* at the time he destroyed himself concluded the question; for that, both in legal and in popular acceptation, the word suicide implied a wilful and criminal act, and must be so taken in the construction of a contract which was to cut down the benefit which the contracting party had purchased upon the event of his death, unless the contrary event was fairly to be collected from other parts of the contract; whereas here the coupling of suicide with death by the hands of justice, rather shewed more strongly that it was used in its ordinary criminal acceptation; and this was further evinced because the interests of innocent creditors were saved, though the act itself was criminal; because, though it might be supposed that a man of perverse and wicked mind might commit suicide for the benefit of his family, when he was in desperate circumstances, yet it could not be presumed he would go that length for the sake of creditors. The act itself, when wilful, was no other than robbery, and it was against such a wicked speculation that the Society meant to provide, but not against misfortune. Where was the difference, in truth and justice, between a person dying from the mere operation of a violent fever, or by the fever affecting his brain, and exciting him to a state of mental aberration to destroy himself, perhaps a few hours or days sooner than in the natural process of the disorder? How could it be meant to apply in sound reason to one who, by mistake, takes poison instead of medicine, or too strong a dose of laudanum, or who throws himself from the top of a house in his sleep, or rushes into the water in a violent paroxysm of pain and fever, or to the case of an officer who goes upon a forlorn hope? Would the members, if they were now to re-frame their articles, agree upon

excluding these cases of misfortune or misjudgment, or of suspension of the will, or of meritorious duty? And as to the strong propensity of persons deprived of reason to destroy themselves, it was open to the directors in any case of such a doubtful subject to exclude him altogether; but if they received his money he ought not, by mere misfortune, to be excluded from the benefit of the Society, without plain words and manifest intent, which did not exist here.[1]

No. LXXX.

CUNLIFFE
versus
LOFTUS.

2d April 1818.

THIS was an action for damages against the defendant for criminal conversation with the plaintiff's wife. The fact was proved, and the plaintiff ultimately recovered Rs. 12,000 damages; but a question arose, in the course of the trial, concerning the proof of the marriage, which, from the evidence, was collected to have been solemnized at Lucknow, on the 15th Dec. 1805, and to have been performed by Dr. Stacey, one of the Honourable East-India Company's Chaplains, who was stationed near to Lucknow, and occasionally went thither, at which place Captain Cunliffe's regiment was then proved, by collateral evidence, to have been stationed.

The following is the whole of the evidence given by the Rev. Mr. Shepherd, the senior Chaplain of St. John's Cathedral at Calcutta, on which evidence the question arose:—Dr. Stacey, whose handwriting this (the certificate of the marriage) is, is dead; he was Chaplain at Dinapore. I obtained this certificate from St. John's Cathedral; it is all in the handwriting of Dr. Stacey, and is the original certificate of the marriage of Captain and Mrs. Cunliffe, sent down by Dr. Stacey from

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[1] But two parallel cases have been recently decided in England, in which it was held, that the proviso against suicide in a policy of insurance included all acts of self-destruction whatsoever. *Borradaile* v. *Hunter*. 1843 (Tindal, C. J., *dissent*). 5 Mann. & Gran. 639; *Schwabe* v. *Clift*. 1846. 2 Carr. & Kir. 134 & Add. *Ib.*

Lucknow, to be entered in the register book kept at the Cathedral for the registry of marriages, &c., at the out-stations. [By this the marriage in question appeared to have been celebrated at Lucknow on the 15th December 1805.] While I officiated in the outer station, I kept a private book of my own, in which I entered all the marriages, but I always sent down certificates of them to be registered at Calcutta. When I performed marriages at a station to which I belonged, there was always a book attached to the station, in which entries were made, the same as at Calcutta. I never took that book from the station when I performed marriages at other stations than my own. I invariably took the attestations of witnesses when I went to a distant station to perform marriage. I invariably gave the parties a certificate of the marriage, signed by the witnesses present, and I sent a duplicate of the same to Calcutta, to be there registered agreeably to the regulations. There was a regulation made by Government for the clergy at that time to send down to Calcutta all the certificates of marriages, baptisms, and so forth, which is still in force. I did not know of it in 1805, and I cannot tell whether the regulation existed then, but I had always done so without a regulation. There were new regulations which came out in 1806, of which this was one, and then I took notice of it as such. Dr. Stacey, whom I met formerly in passing up the country, had told me that such was the general practice, to send down certificates of marriages, &c., to Calcutta. I have seen many entries of marriages at the out-stations in the cathedral books: formerly they were not so regular in form as now. There are many entries of marriages, without the names of any witnesses, both before and after 1805. When I spoke of usage in this respect, I meant my own practice only; I do not know what was the practice of other chaplains. Dr. Stacey belonged to the Dinapore station in 1805. I continued on it till 1807 or 1808. The reason why marriage certificates were required to be sent down from the out-stations to Calcutta was, because three copies were required to be sent, one to the Government, another to the East-India House, and the third to the Supreme Court. The certificate in question was taken by me off the file of original certificates in the cathedral: an entry of it has lately been made, in August last, in the registry book, but it was made without my authority. There were two other certi-

ficates of marriages also regularly filed with this, which were not entered in the book.

The Court held that the marriage was well proved.

No. LXXXI.

RADAMOONEY DOSSEE AND OTHERS
versus
KISTNOMONEY DOSSEE AND OTHERS.

9th April 1818.

ONE of the defendants to a bill filed, before answers put in by the others, pleaded to the jurisdiction in the last term; and before the eight days expired after notice of the filing of such plea the plaintiff obtained further time to reply; and after such further time had expired, without any replication filed, the defendant set down her plea to the jurisdiction with the Clerk of the Papers for argument. Thereupon the plaintiffs obtained this rule, calling on the same defendant to shew cause why, upon payment of costs by the plaintiffs up to the time of setting down the plea for argument, and exclusive of the costs of setting down the same, the bill should not be dismissed as against such defendant; and the only question was, whether the defendant was entitled also to such costs.

East shewed cause, and relied on the practice of the Court of Chancery at home, on which the books say that pleas to the jurisdiction must be decided upon by the Court in open Court, as well as those which go to the merits; and that this rule was not varied by the 24th and 25th Rules on the equity side of the Supreme Court[1], which had been relied on in moving for the rule. See Wyatt's Prac. Reg. 325. 329. 326. 330; Mitf. Ch. Plead. 239. 243; 3 Bro. Ch. Ca. 372.

Hogg, in support of the rule, relied on the two Rules of this Court referred to, as giving a different practice from the Court of Chancery.

The Court, after a few days' consideration, made the rule absolute, considering the 24th Equity Rule as varying the practice of the Court of Chancery in this case, and giving to the plaintiff alone the alternative of replying to the plea, or entering the same with the Registrar for

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[1] 2 Sm. and Ry. 148, 149. par. 27, 28, 29.

argument; and if the plaintiff did neither the one nor the other within the appointed time of eight days, the defendant could only move to dismiss the bill for want of a replication, which the Court would do of course, unless good cause could be shewn for the omission or delay. They rather considered the 25th Rule (which says, "that in case there shall be several defendants, such order for dismissal shall not be moved for or obtained until a full answer shall have come in from them all, unless proof should be made to the satisfaction of the Court that the complainant had not used due diligence to procure the same") as not applying to the case of a plea to the jurisdiction, but to the case of a defendant answering before the rest; in which case it might be important to the complainant not to be compelled to reply till an answer came in from all; and perhaps the same might apply to a plea upon the merits. But the plea of this defendant to the jurisdiction went merely on the ground that she had never resided in Calcutta, or otherwise subjected herself to the jurisdiction of the Court, and had nothing to do with the merits of the question as to the other defendants.

No. LXXXII.

NUBKISSEN MITTER AND OTHERS
versus
HURRISCHUNDER MITTER AND ANOTHER,
and vice versâ.

11*th April* 1818.

Upon a bill for an account and partition among Hindú heirs, the only question was upon the will of the father as to the distribution of an estate dedicated to the worship of the deity, together with the possession of the idol after the death of Juggomohun, the second son of the testator, who had been appointed manager.

Spankie, A. G., and *Compton*, for the complainants, stated the will of the testator in this respect to be as follows: "My son Juggomohun will manage the collection, &c., and pay the expenses of the worship of the deity, the daily worship, festivals, &c., in a suitable manner, according to the paper signed by me: with whatever remains after deducting that, he will pay for the requisite repairs of the deity's temple; after deducting which he will get the requisite articles made for the idols as

may appear necessary: with whatever remains, the ornaments &c. of the idols, and the gold and silver chains, &c., requisite articles which I have given, he has no concern whatever, or have my heirs. Should the said Juggomohun occasion any interruption in the worship of the deity, or embezzle or make away with any thing from the profits thereof (which may the deity forbid!), my other heirs will be able to take an account thereof on behalf of the deities."

The testatator devised a certain estate, as *Deowuttur*, for maintaining the worship of the deity.

All the rest of his property he devised to his three sons in the following proportions: 1st, to Ramohun, five-sixteenths; 2dly, to Juggomohun, six-sixteenths; and 3dly, to Gowermohun, five-sixteenths.

Juggomohun was appointed by the will to be the general manager of all the estate.

The three brothers all died, each leaving sons, Ramohun, the eldest of the brothers, having died in the lifetime of the father.

The two defendants in this suit were the sons of Gowermohun, and the complainants the sons of the other brothers.

All the property except this *Deowuttur* had been divided under the decree of the Court; but the Commissioners had not divided this part of it.

Fergusson was heard for Hurrischunder and his brother; after which the following questions were put to the Pandits of the Court.

Q. 1. If a Hindú dedicate a particular estate to the worship of the deity, and appoint by his will his second son to be manager (the elder having died in his lifetime, leaving sons), without making any provision who shall succeed to the management after the death of his second son, does the management, on his second son's death, leaving sons, devolve on the general heirs of the donor, or go to the heirs of such appointed manager?

A. The heirs of the donor are to take the management according to their shares.

Q. 2. If the donor has divided his estate by will into three unequal shares between his three sons, *ut ante*, will the descendants of the several sons share the management in the same proportions as they do

the rest of the donor's estate, or will they share it equally according to the general rule of law?

A. Each will take according to the proportion assigned him by the will.

Q. 3. Who is to have the first turn if neither have managed before?

A. They will take it in turn according to their own ages, the eldest son of the manager appointed by the common ancestor having the first turn.[1]

Q. 4. Is the turn to be enjoyed by a year or years, or months, or days?

A. According to convenience.

Hereupon it was referred to the Master to consider and report the most convenient mode of the three branches enjoying this management of the idol and dedicated estate in future, and also to report as to the enjoyment which had already taken place by one of the branches, whether adversely or by consent of the other two. This was done in order that a special provision might be made in the first instance for equalizing, as far as circumstances would admit, the period of management to each branch.

The Master reported accordingly; and after some discussion on the plan proposed by him for such equalization, which was objected to by some of the parties, and the Report was sent back to him for re-consideration, and his corrected plan was approved, the decree was drawn up upon the basis of the Pandits' opinion, that the management was to be shared in the same proportion between the sons of the donor and their several families, as had been appointed by the donor for the rest of his estate.

The Court, however, expressed some doubt at the time concerning the opinion of the Pandits on this point, but it was never mentioned again in Court; and as the parties appeared to have been finally satisfied with the amended Report of the Master as to the mode of managing the idol in future, the decree was framed by the counsel for the different parties accordingly, on the basis of the opinion delivered by the Pandits.

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[1] This had in fact taken place in this case on a claim of continuing right.

No. LXXXIII.

GOPEYMOHUN TAGORE AND ANOTHER
versus
RAMANUND GHOSE.

20th June 1818.

THIS cause having been appealed to the King in Council, the judgment of the Court was affirmed, but nothing was said about costs.

Upon a rule to shew cause why the Supreme Court should not direct the costs of the appeal to be taxed,

Spankie, A. G., and *Compton*, were heard in support of the rule, and contended that the costs of the appeal were in the discretion of the Supreme Court, where the Court of Appeal had not given any special order on the subject; and they referred to the case of *Prendergast* v. *The East-India Company*, where, as it was said, such an order had been made in 1802.

Fergusson and *Hogg* denied the authority of the Court to make any such order, except by consent of the parties, and doubted the application of the case cited. They referred to one case where a special order had been obtained for the payment of costs of an appeal out of an estate in Court[1]; and another where, after the case in 1802, such an application as the present was refused. In *Mullick* v. *Mullick* it appeared, by the 13th and 14th Sections of the Charter, that the power of giving costs is confined to suits before this Court. The 30th Section directs security to be taken as to costs for the performance of such judgment or order as the Court of Appeal shall think fit to give or make thereupon.

The Court were clearly of opinion that it could not give the costs of an appeal, which the Court of Appeal only could direct.

Rule discharged.

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[1] *Quære*, in case of executors or trustees.

No. LXXXIV.

MAGNIAC AND ANOTHER
versus
BROWN.

16*th August* 1818.

THIS was a case upon the construction of the new bill of lading in an action against a captain, out of whose ship, while lying in the Canton River, a certain quantity of Sycee silver, shipped in boxes, was stolen by river pirates, admitted to be done without negligence, in fact, imputable to the captain or crew.

EAST, C. J., was of opinion that the captain was discharged from liability.

BULLER, J., agreed with EAST, C. J., in such discharge, on the construction of the new bill of lading.

MACNAGHTEN, J., seemed against that construction; but concurred in the judgment on the ground of a compensation already received by the plaintiffs from the insurance office.

Though that appeared to the other Judges to have been expressly paid subject to the result of this action; the insurance office having reserved a right to sue the defendant in the plaintiffs' name, and thereby insisting on his liability to make good the plaintiffs' loss in the first instance, and only to indemnify them in case they could not recover.

The two Judges held, 1st, That, at common and maritime law, all common carriers by sea are liable in the same manner as carriers by land for all loss, except by the act of God or the King's enemies, and are consequently liable for loss by fire, robbery, or any accident (other than by the immediate act of God or the King's enemies); and this is declared by the Statute 26th Geo. III. c. 86; but such carrier may lessen his liability by accepting the carriage of the goods upon a special contract.

2dly, The defendant (the captain of the ship) having by his special acceptance, stated in the bill of lading, excepted himself from answering for any loss of the silver "by the act of God, fire, the King's enemies, and all and every other dangers and accidents of the seas, rivers, and navigations, of what nature or kind soever;" and robbery being a danger of rivers, as much as piratical robbery is a danger of the seas; and it

being admitted that the robbery of the silver in question out of the ship on the Whampou River in China took place "without any neglect, in fact, of the defendant, further or otherwise than as the same might be implied from the loss of the article" (which takes the case out of the Statutes 7th Geo. III. c. 15. and 26th Geo. III. c. 68.); such defendant, as the master, is not liable to make it good by his contract, as it seems he would have been if the loss had been imputable to the want of due care and protection of himself or his crew; the fact being that the ship was robbed at night of the silver by persons unknown, and not belonging to the ship, breaking open from without the port-hole of the gun-room wherein it was deposited.

3dly, They held, that though the exportation of silver from China was illegal, and prohibited by the law of that country in which the contract in question was in fact made; yet that it having been made between British subjects, whose national policy it was to promote such exportation to their own country or its colonies, there was no objection on that ground to enforcing the contract in the Supreme Court.

4thly, They held, that though there were several degrees of refinement of Sycee silver imported into Calcutta from China, varying to the extent, including the refuse, of nearly 20 per cent., yet that by far the greater part of it varying only from one and a half to two per cent., and being always taken in payment of goods at Canton at an exchange of 72 Tale for 100 Spanish dollars, at which rate it was taken by the East-India Company's Officers; and as the number of Tale weight of the Sycee silver in question was stated in the bill of lading, which, at the accustomed weight of exchange, enabled the value to be exactly estimated, this was a sufficient compliance with the Statute 26th Geo. III. s. 3. requiring "the true nature, quality, and value of the silver, &c. to be inserted in the bill of lading, or otherwise declared in writing to the master or owner." It appeared, also, that the freight was paid at the time, as stated in the bill of lading, at the rate of one per cent. on the estimated value of the silver, which shewed that such value was known to the parties contracting, however shortly expressed.

5thly, The two Judges did not rest the case on the ground taken alone by the third Judge, that the insurance office had already paid the plaintiff for the reasons first stated.

No. LXXXV.

DOE DEM. GUNGANARAIN BONNERJEE
versus
BULRAM BONNERJEE.

20th July 1818.

THIS was an ejectment for 1 *Bighá* 4 *Cottahs* of land in Calcutta, for 5 *Cottahs* of which this defendant made defence.

There was another ejectment brought on the same title, and defended by another defendant.

The facts in substance were as follows: Choytunchurn, the former owner, being above sixty years of age, and subject to occasional fits of derangement, left Calcutta without notice to his family, and never appeared there again. At the time of his departure he left his wife Chandanee and a grandson by a deceased daughter, which grandson is the lessor of the plaintiff. There was some contrariety of evidence as to the time when Choytunchurn disappeared from Calcutta, but the probability was that it was in the Bengal year 1206. He was never heard of again in Calcutta, except that a witness proved that he had seen him alive at Benares in the Bengal year 1219; but the evidence given by this witness was strongly attacked by several others, who spoke to seeing the witness continually in Calcutta during the whole of that year, and before and after, following his business, in a manner that rendered it highly improbable that he should have been absent long enough at a time to have gone to Benares without observation, and ultimately no reliance could be placed on his testimony in this respect; and there was no evidence to shew when Choytunchurn died, other than was said by this winess, who swore that he saw him still alive but just before his death.

The defendant claimed under a conveyance, executed in Asvina 1215, from the supposed widow Chandanee, and the lessor of the plaintiff, the next heir; and there was also evidence, though not without contradiction, that the land had been sold for the payment of arrears of public taxes, and also for the necessary subsistence of the family.

There was also conflicting evidence as to whether the lessor was of age at the time when he executed the conveyance to the defendant; and

it was certain enough that he came of age about that time, either shortly before or after.

The case stood over for two or three terms, with the recommendation of the Court to the parties to compromise and settle their claims; but this not being effected, the lessor of the plaintiff was nonsuited in this and a similar cause against another defendant in possession of another part of the property.

The general ground of the opinion of the Court was, that, putting out of the question the evidence of the witness who stated that he had seen Choytunchurn at Benares in 1219, just before his death, which they did not believe, the precise period of Choytunchurn's death was uncertain; and assuming that the Hindú period of the presumption of the death of an absent person unheard of may be twelve years was to govern the case, and that therefore the presumption of his death from the mere lapse of time between his departure from Calcutta and the execution of the conveyance to the defendant in Asvina 1215 could not be made; and assuming, also, that the Hindú laws did not admit of the doctrine of estoppel against the lessor, by reason of his own conveyance, supposing him to have been of age when he made it; yet still, as the *onus probandi* lay upon him to shew his own title to recover, and as his conveyance *primâ facie* imported that he was of age to convey unless the contrary appeared; and if he were of age to convey, his recital of the death of his grandfather in such his conveyance was proof as against him, at least *primâ facie* proof of the death, unless the contrary appeared; and as the evidence offered by him of non-age, though it might raise a doubt, was not satisfactory, and encountered by evidence to the contrary; the first and more reasonable presumption that he was of age, and that his grandfather was dead, as he himself had recited in his conveyance, must stand in favour of the defendant, a purchaser for a valuable consideration, especially as there was also reasonable evidence of a sale founded upon the necessity of the family.

While the case was standing over for the consideration of the Court the opinion of the Pandits was taken upon some points that arose in it, and the following paper was delivered to East, C. J., by Macnaghten, J., which was drawn up by his son, an officer of the Sudder Dewanny Adawlut.

"A man's only son, being of full age, in the absence of his father sells his land: the father dies, leaving the son, who proceeds to recover the land which he himself had sold, alleging that his sale, made while the father was alive, was invalid. Is this sale, so made, good against the person who made it, as between him and the purchaser, who paid him a sufficient consideration?

"In answer to the above question, the first Pandit of the Sudder Dewanny Adawlut delivered the following opinion:

"A sale made under these circumstances is not good against the person who made it, as between him and the purchaser, who must immediately restore the land to the seller on being required by him to do so. The reason of this is, because the son had no ownership in the land during his father's lifetime, and was not therefore at liberty to dispose of it in any manner. A sale without ownership is void *ab initio.* If *A* were to purchase from *B* the property of *C* without the consent of the latter, *A* would be compelled to restore it to *C*, the owner. The seller in this case stands in the place of *B* and *C*, the seller and owner. The only fact to be regarded is that of his having sold the land when it was not his to sell; and when his right of ownership accrues he has just as good a right to recover the land so illegally sold by him, as though a third person had been the seller. It matters not that the same individual who made the illegal sale should afterwards become the lawful proprietor: he is looked upon by the law as two distinct persons relatively to the contract, which, being void *ab initio,* can never acquire validity so as to be binding on him. On the death of his father he inherits the land as a matter of course, as if such contract never had existence. If the father had returned and claimed this land from the purchaser, the latter would be compelled to surrender it without any remedy against the father. But if the son recover it after the death of his father, the purchaser may bring an action against him (the son) for his purchase-money, and the ruling power will direct the amount to be refunded in whatever manner may be considered most equitable. There is no express text pointing out the manner in which a purchaser, having made a purchase from a person selling illegally, is to recover his purchase-money, but it is an equitable inference that he should recover it. The authorities are express and unanimous in declaring that he must restore the property to

the rightful owner, which he may have purchased from a person who had no right to sell it.

"All this of course presupposes that the son was not necessitated to sell the land for the support of the family; for, if he had been, he could not on any pretence recover the land, but the sale would hold as good as if the father had made it.

"The above was considered by the second Pandit of the Sudder Dewanny Adawlut, the Pandit of the Provincial Court of Calcutta, the head Pandit of the College, and another Pandit.

"*Dicta* by the same Pandits.

"He who has absented himself for the period of twelve years, and of whom no intelligence has been received during that time, must be considered as certainly dead; and should he even return after that time he has forfeited all rights of the living.

"In the province of Benares a little more time is allowed, and fifteen years, if the absentee at the time of his departure was under fifty years of age, is the period at which his death may be inferred."

Mr. Macnaghten then proceeds to give his own opinion on sales, as follows:

"If a widow make a sale in perpetuity of her husband's landed property, by a deed to that effect, the purchaser, as she had no right to make the sale, will not be benefitted by it, nor will he be entitled, in virtue of it, to the interest which the widow has in the estate. This is founded upon the principle of the sale being without ownership, which renders it void *ab initio*, and not, as I before thought, upon the principle of a greater interest being conveyed by the deed than the widow was competent to grant. The Pandits whom I have to-day consulted agree in saying, that if one of four brothers make a deed of sale of the whole patrimonial property, it will hold good as far as his share is concerned, because the sale creates ownership in the purchaser, and not the deed, which is only proof of the sale, and may be taken to prove it as far as will serve that purpose, though invalid. With respect to the conveyance of the property of the other brothers, it is valid against himself, and is proof of his intention. Not so in a deed made by a widow: she has no unlimited proprietary right over any part of her husband's property, but merely a general usufructuary right over the whole indiscriminately.

It is clear therefore that she cannot convey the whole in perpetuity, but the deed by which she conveys it is void *ab initio* as to the sale, nor can it convey the interest which she possesses, which (independently of its not being transferable) is an interest of a totally different nature from that of proprietary right."

No. LXXXVI.

JOHN MARIANO HENRIQUES

versus

WILLIAM THOMAS BENNETT AND THE SHIP ADMIRAL MOORE.

10*th August* 1818.

Money stated that this was a libel to recover S. Rs. 3423, which the Promovent had expended in repairs upon a ship in the port of Calcutta, against the owner of the ship, an inhabitant of Calcutta and a British subject, who had applied to the plaintiff to undertake the repairs, and put the ship into his hands for that purpose, and that the plaintiff had retained possession of the ship ever since.

The case came on to be heard *ex parte*, and 2 Lord Raymond, 1453; 1 Rob. Adm. Rep. 280; 2 Bac. Abr. 181; *Menetoné* v. *Gibbons*, 3 Term Rep. 267; Cowper, 636; and 2 Bro. Civ. Law, 79; were cited, to shew that the ship might be proceeded against for repairs in the Court of Admiralty, though the contract was on shore;

But the Court held otherwise, and that the party must be sued upon the contract for the repairs in the ordinary jurisdiction. Under these circumstances the libel was dismissed.

No. LXXXVII.

DINGWALL, EXECUTOR OF ELIZABETH SLOW

versus

ALEXANDER, EXECUTOR OF JAMES ROLT.

12*th November* 1818.

THIS was a bill filed against the executor of the debtor by one of many creditors, on behalf of himself and other creditors, &c., for an account, and after having proved his own debt to the amount of S. Rs. 34,162 before the Master, and obtained the Master's Report of such

debt due, he moved for a decree that the executor should pay this demand, as of a judgment creditor in the first instance; and all other debts of other creditors who should come in under the decree and prove their debts, to be paid in due course of administration.[1] The object of this procceding was, to get an advantage over the other creditors, the estate being insufficient to pay all, on the ground, that, by the proof of his debt before the Master, he was entitled to be considered as the first judgment creditor upon record, a decree being equivalent to a judgment at law in this respect.

The executor made no objection to this proceeding, but assumed to act according to the directions of the Court, though evidently wishing to favour the complainant; and after the decree in confirmation of the plaintiff's debt was obtained, the executor obtained an injunction against several other creditors of the estate, who were proceeding at law against him. This was granted on the terms of the executor paying the costs of such creditors up to the notice of the decree.

Spankie, A. G., on behalf of the plaintiff, had moved for an order for the executor to pay the plaintiff's debt under the decree in the first instance; and he cited *Morice* v. *The Bank of England*, 2 Bro. Parl. Cas. 465; Cas. Temp. Tal. 217. He contended that the proving before the Master of a simple contract debt under a bill of this nature was like a judgment for that creditor, 10 Ves. 28; and that it was like confessing a judgment at law, *Reynolds* v. *Brook*, 1 Bro. Ch. Ca. 182. The plaintiff had obtained a priority by this decree before any judgment obtained by any creditor at law, *Martin* v. *Martin*, 1 Ves. 211; *Perry* v. *Phelips*, 10 Ves. 34. 2dly, He argued that the creditors had acquiesced in this decree, framed as it was for four years; and that they had been parties to the bill for near four years; and that they were too late to move for a re-hearing: at most they could only object by a bill of review.

Fergusson, for the executor, defendant, seemed to support the application, as far as he could without committing the executor openly.

The Court objected to make the order, considering that the proceeding was in fraud of the general creditors, many of whom had come

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[1] See the form of this decree *infra* No. XCI.

in under the decree; and some of them had, at the suit of the executor, been enjoined from proceeding to recover judgments at law; but as these creditors did not appear by any person in Court, and the parties before the Court insisted on their right to priority, the Court took time to consider the case, and to look into the authorities. These are 3 Ridgw. P. C. 75; *Dillon* v. *Burton*, Ib. 101; *Largan* v. *Bowen*, 1 Sch. and Lef. 296; *Wortley* v. *Birkhead*, 2 Ves. 571; *Lord Bristol* v. *Hungerford*, 2 Vern. 524; *Gifford* v. *Hort*, 1 Sch. and Lef. 386; *Atherton* v. *Worth*, 1 Dick. 376; *Douglas* v. *Clay*, Ib. 393; *Brooks* v. *Reynolds*, 2 Dick. 603; *Kenyon* v. *Worthington*, Ib. 668; 1 Bro. Ch. Cas. 182; *Rowe* v. *Bant*, 1 Dick. 150; *Coysgarn* v. *Jones*, Amb. 613; 1 Sch. and Lef. 156; 2 Sch. and Lef. 398; 4 Ves. 643; 1 Eq. Ca. Abr. 167; *Shepherd* v. *Kent*, 2 Vern. 435. The result of all the authorities appeared to be this:—A decree in equity is of equal validity with a judgment at law: creditors may run a race for priority of judgment or decree, either at law, or in equity, and, each proceeding singly, the Court will not interfere; but if a creditor file a bill on behalf of himself, and of other creditors, so soon as he has obtained a decree for an account, the Court will, upon application, enjoin all other creditors (who have not before obtained judgment or decree for their individual debts) from proceeding further at law or in equity; because, having possession of the fund, or having the whole in account before them, they can administer the assets in due course. But unless there be such a decree first obtained, under which all the creditors may come in, no injunction can be obtained to stay the suits of separate creditors. But it is an invariable principle of equity, that, under a bill filed by one creditor on behalf of himself and others, all who come in under the decree, whether simple contract or specialty creditors, must share alike, and that no priority is allowed as between them; and that principle ought not to be infringed by any technical management in framing a decree drawn by the parties themselves without opposition, and while the bill was under their own controul, without the intervention of the other creditors. And that the Court themselves were bound to take care that the rights of all creditors coming in under the decree should be preserved. They therefore ordered and decreed, that all the creditors who had come in under the decree in

question should share equally, without any preference to the complainant in point of priority.

The bill in question prayed an account of the assets come to the defendant's hands, and that he might be decreed to pay to the complainant the balance due from Rolt's estate, and for such further or other relief in the premises as might be consistent with the claims of such other creditors of Rolt who should come in and seek relief by, and contribute to the expenses of, this suit, and prove their claim, and as to the Court should seem meet.

The plaintiff subsequently proved his debt before the Master to above Rs. 35,000, and obtained a decree for the same, and the payment thereof in due course of administration.

Upon which interlocutory decree or order he relied for his priority.

No. LXXXVIII.
HOWARD
versus
HEMMING.

13th November 1818.

THIS was an action of assumpsit for money had and received by the defendant, to the plaintiff's use, and upon an account stated.

One Francis Norton, the natural son of a British subject, died, some short time previous to this action being brought, in Calcutta, leaving property there: the defendant, as Registrar of the Court, took out letters of administration as to a British subject deceased, and collected the assets, which were not inconsiderable, and retained the usual commission of 5 per cent., under the general Statutes of 39th and 40th Geo. III. c. 79., and the particular Statute 55th Geo. III. c. 84. ss. 2, 3., as well as under the Charter, &c. In the mean time the plaintiff, who was connected by family ties with the deceased, applied to the Crown, as in the case of a natural child deceased, and was appointed the nominee of the Crown for the purpose of obtaining possession of the assets, and as such, brought this action to recover the amount of the commission retained out of the assets by the defendant.

Spankie, A. G., and *Money*, for the plaintiff, contended, 1st., that this was not a case within the Registrar's Act at all, the deceased not

being a British subject; or if it were, and that the commission should be apportioned according to the Act, which says that the Court shall allow commission, reference being had to the degree of trouble, &c., here was little or none in possessing himself of the Company's Paper belonging to the deceased; 2dly, that the Crown was not liable to be charged commission, and therefore certainly not its nominee.

Mr. Thomas Astell was called as a witness to prove what the charge made by agents in Calcutta was. He stated that the common charge for management of estates by such agents was two and a half per cent. on the receipts, and one per cent. more if debts were to be paid out of the estate, and five per cent. if the whole estate were to be managed.

Fergusson, for the defendant, said that the defendant had had all the duty and collection of assets for two years, and had therefore a meritorious claim. He had offered to take a sum as composition, but he was entitled, at any rate, to such portion as the Court thought reasonable.

The Court, finally, thought that the nominee of the Crown stood in the same condition as any other representative of a deceased, and that the Registrar was equitably entitled to his commission at the usual rate.

No. LXXXIX.
RICHARDSON
versus
BETHAM.

26th November 1820.

THIS was an action of assumpsit on a foreign bill of exchange by the indorsee, against the payee and indorser for S. Rs. 4140, drawn by one Beauregard on the 14th Sept. 1815, on Messrs. Palmer and Co., thirty days after sight, payable to the defendant, by him indorsed to one Johnson, who indorsed it to the plaintiff.

The bill was presented to Palmer and Co., by whom it was dishonoured for want of assets, and noted accordingly; but there was no evidence of any protest regularly drawn up, unless it was to be implied from the circumstances, and this was not strictly made out by legal evidence, though probable, on account of the absence in England of the notary public, by whom, if at all, it had been made.

But the plaintiff rested upon evidence of a waiver by a subsequent

promise, or rather on the ground of such subsequent promise, implying that a regular protest had been made, by which he had become liable. For this purpose Mr. Scott, an attorney of the Court, proved, that about the end of February, or in March 1817, the defendant, accompanied by the plaintiff, who was his client, came to his office, and both of them instructed him to draw up a deed of covenant which had been suggested by counsel, by which the plaintiff was to covenant, that, in consideration of the payment by the defendant of this bill of exchange, he would sue Beauregard (who was then expected at Calcutta) as soon as he arrived; and upon recovering the amount from Beauregard, would pay it over to Messrs. Colvins, the defendant's agents in Calcutta: he also proved that the defendant had become a bankrupt in England since the indorsement of the bill, and had obtained his certificate, and could not sue Beauregard himself, but the plaintiff was to sue him for his, the defendant's, benefit: that it was, in consequence, intimated to him afterwards, by the plaintiff and the defendant, that the money had been paid by the defendant into the hands of Messrs. Colvin and Co., the defendant's agents, and that an amicable action should be commenced by the plaintiff against the defendant, in which the said Messrs. Colvin and Co. should become bail; which action was to remain suspended for a reasonable time, to enable the plaintiff to sue and recover the money from Beauregard, if he should arrive at Calcutta in the meantime. Accordingly, this action was brought, and suspended for a reasonable time; but Beauregard, though still living, had never returned to Calcutta.

Fergusson and *East*, for the defendant, objected, 1st. That this being a foreign bill, the defendant was entitled to have the dishonour proved by a regular protest, and nothing less would suffice; 2dly, That he could not be bound by the promise to pay, unless he knew, at the time, of the objection against his liability, and therefore intended to waive it; 3dly, That at any rate the promise was only conditional, and the condition had not been complied with; for Beauregard had not been sued, and the object was to avoid the effect of the defendant's bankruptcy, which would preclude him from recovering over against Beauregard; and the time allowed was not reasonable, for the rule to plead was given on the 22d March 1817.

A special plea of the defendant's bankruptcy &c. was filed on the 25th June 1817, and amended on the 3d July: replication and demurrer were filed on the 7th July, and joinder in demurrer on the 10th Nov. 1817, on which there was argument and judgment on the 11th July 1818.

Compton, for the plaintiff, contended that there was evidence that the defendant saw the bill after it was noted, which was in March 1817, and that his subsequent agreement to pay it shewed that he was satisfied that there had been a regular protest. His sole objection was on account of his bankruptcy, which the Court had since held to be no discharge of him in India, to which country the bankrupt laws do not extend.

The Court, after consideration of the authorities, gave judgment for the plaintiff, on the ground that the subsequent promise was evidence of the protest.

No. XC.

RAMLOCHUM ROY

versus

GUDDADHUR OUCHARJEE.

28th November 1818.

THIS was an issue to try the previous question of jurisdiction upon a bill filed against the defendant for an account, &c. &c.; and the question was, whether the defendant was an inhabitant of Calcutta on the 2d March 1818, when the bill was filed. This was attempted to be established in two ways; 1st. By shewing that about that time, and for some time before and afterwards, though his general place of residence was Bhowannypore, out of Calcutta, yet he had come into Calcutta frequently, and, for many days together, had slept at the house of a woman whom he had in keeping in the town, and that persons had visited him both in the morning and evening at that house. 2dly, That at that time, and for many years before, he had followed the business of a banyan for ships' captains, that is, he had kept a godown, with servants, in which the business of those captains was transacted, assisting them in disposing of and completing their cargoes, buying and selling for such captains, and supplying them with some articles. That the godown was at first taken in the name of one of those captains; and he was charged with the

rent in account between him and the defendant, but the defendant was the person answerable to the landlord. The godown was also changed at times, and it was doubtful whether, at all times of the year, the defendant had any godown on hand; but he held one in Dacre's Lane about this period, and had goods in it, though there was evidence given in his behalf that he had given it up some time in February. It was, however, opposed by other evidence; and it was clear that he was still, and afterwards, professing to carry on the business of a ship banyan, and the Court had no doubt that he was all the time ready to serve any customer that offered; and it was clear upon the evidence that that business was necessarily carried on in Calcutta, and that servants were employed by him, though they might be charged again in account with the captains.

The Court had no doubt that the inhabitancy on the second ground of the exercising the business of a banyan to ships' captains in Calcutta, where he kept godowns and servants in that employ, was satisfactorily established, without adverting to the first ground.

Note by Sir E. H. East.—It also appeared to me, that if a case were plainly established, in fact, of a residence in the house of a prostitute, it would not serve the party as an excuse; that the object for which he had become an inhabitant, in fact, was an immoral one; and if he were proved, in fact, to be dwelling and sleeping in a house in Calcutta, it would not be competent for him to allege, in negative of his being an inhabitant, that he so dwelt and lodged for the purpose of prostitution, when, if his purpose were innocent, as a mere visitor, it would conclude him.

No. XCI.

DINGWALL executor, &c.
versus
ALEXANDER, executor, &c.

The form of the decree referred to in the case reported *ante* No. LXXXVII. was as follows in substance:

"Thursday, 16th June 1814, Between, &c. &c.

"This cause coming on this day to be heard, &c., upon reading an order of the Court made on the 8th June instant, and an affidavit of

G. C. &c. of the due service thereof, a subpœna to hear judgment &c., and another affidavit of G. C. of service thereof, the probate of the will of Elizabeth Stow granted to the plaintiff, and an order of the Court of the 10th June instant, and an affidavit of G. C. of service thereof, and also on reading part of the complainant's part of the account of the defendant, and upon hearing counsel on both sides,

"This Court doth order, decree, and declare, that the principal and interest claimed by the complainant, amounting to Rs. 34,162, is due and owing to the complainant, as executor of Elizabeth Stow, and that the same, with costs of suit, be paid by the defendant in the due course of administration, so far as assets come or to come to his hands shall extend.

"And this Court doth further order and decree that it be referred to the Master to take an account of the estate of James Rolt, deceased, &c.

"And it is further ordered and decreed that the Master take an account of the testator, James Rolt's, debts and credits; and all James Rolt's creditors are to be at liberty to come before the Master and prove their debts; and the Master is to advertise accordingly, &c., for that purpose, for them to come, on or before the 16th December next, and in default thereof they will be excluded the benefit of this decree; and reserving further directions till after the Master shall have made his report on the matters referred to him, and in the meantime all parties to have leave to apply to the Court."

Upon this the Master afterwards made his report of the assets, debts, and credits, in which, *inter alia*, after noticing a judgment debt to a large amount to the house of Alexander, for which there was more than a sufficiency of assets, he notices that there was no other judgment creditor of Rolt, unless the complainant should, by the above decree, be considered by the Court so to be, which he submitted to the Court, and for whose debt there were also sufficiênt assets; but there were also debts to a large amount of creditors who had come in, which the assets were not sufficient to recover.

No. XCII.

BRUCE

versus

THE EAST-INDIA COMPANY.

11th December 1818.

A BILL was filed by one Bruce against the Honourable Company, to compel them to renew one of their notes that had been issued for raising a certain loan at Bombay, and which was to be renewed after a certain time, or paid at Calcutta. To this the Company answered that the note would be paid off with interest, if demanded at the treasury; but they refused to renew it as not being bound so to do at the option of the holder.

The Supreme Court had decreed, several years before the institution of this suit (*tempore* Russell, C. J.), that on payment by the Honourable Company to Bruce of the sum mentioned in the note (Bombay Rs. 25,000), with interest and costs, the bill should be dismissed; against which decree there was an appeal by Bruce; and, on the hearing, the Privy Council decreed that the decree of the Supreme Court should be reversed, and that the appellant's bill should be dismissed, in so far that it prayed that the Honourable Company should be decreed to grant a Bengal promissory note in lieu of the Bombay certificate, but decreed that the Honourable Company, Respondents, should, agreeably to their offer, pay to the appellant the amount of the certificate, with interest to a certain day.

In the meantime the costs ordered by the Supreme Court had been paid by the Honourable Company to Bruce. The complainant's counsel *Fergusson*, had, on a former day, obtained a rule to shew cause why it should not be referred to the Master to tax the plaintiff his costs of appeal, the decree of this Court having been reversed by the Privy Council, though no mention of costs had been made by them; and he cited 1 Str. 617; 1 Ves. 542; 2 Ves. 100.

Spankie, A. G., now shewed cause, and contended that this Court had no power to give any costs which the Court of Appeal had not thought proper to decree; and further, that having reversed the decree of this Court, which had directed the costs of the suit to be paid by the Honourable Company to Bruce, these costs must be refunded.

The Court were clearly of this opinion, and discharged the rule for

taxing the plaintiff his costs of appeal; and were of opinion that the costs before paid to the plaintiff must be refunded, the whole decree being reversed, including the costs, and no costs having been given by the Privy Council.

No. XCIII.

FRAMJEE COWANJEE.

versus

THE SHIP OR GRAB SHAW ALLUM, *alias* SHAW ALVEY, AND JEREMIAH JAMES DENHAM, MASTER.

16th January 1819.

THIS was a libel upon an hypothecation bond, and to decree a sale of the ship.

Upon some doubts expressed by MACNAGHTEN, J., as to this course of proceeding against the ship itself,

Fergusson, for the promovent, mentioned precedents, one so early as the time of Sir Robert Chambers.

Decreed accordingly.

No. XCIV.

JOSEPH DE GARCIA AND OTHERS

versus

THE BRIG OR VESSEL MINERVA.

18th July 1820.

THIS was a libel by the promovents, mariners on board the ship, to recover their wages by a sale of it; the master, after the voyage performed, having absconded to Chandernagore, out of the jurisdiction of the Supreme Court, and the owners not being at Calcutta, nor any agents of theirs, and no persons having come in on the usual proclamations to come in and defend.

East, for the promovents, who sued *in formâ pauperis* at the hearing, moved to read the original affidavit of the several promovents of the amount of their wages, and proof of their service on board the ship to be read, upon which the process had issued, which was done accordingly, and thereupon

The Court decreed a sale of the ship to satisfy their demands, and that the surplus, if any, should be retained till a proper claimant appeared.

No. XCV.

EX-PARTE REID.[1]

23d January 1819.

THIS came on upon a rule to shew cause why Mr. Reid, who had been arrested at the suit of a creditor by a writ issued out of the Supreme Court, should not be discharged on the ground of his privilege as a witness, he having come to Calcutta, as he alleged, in obedience to a *subpœna* issued in a certain cause, to attend the examiner at his office, in order to have his deposition taken.

It appeared, upon the whole, that Mr. Reid, though visiting Calcutta from time to time, either as agent, witness, or party in certain causes, both in this Court and the Sudder Dewanny Adawlut, was generally inhabiting in the Mofussil, and principally at Purneah.

A *subpœna* had issued to examine him as a witness in a cause in the Supreme Court in the examiner's office, and after much previous delay, not satisfactorily accounted for by him, he had come down last from Serampore, on the 13th of the present January, and had gone to the examiner's office, who had told him that he could not then examine him, but that he would do so on the 15th, if he had time. On the 15th he called accordingly, but the examiner was obliged to postpone the examination again to the 18th. Mr. Reid left the examiner's office about 12 o'clock on the 15th, and proceeded to his attorney's, to advise, as he said, about the cause, and left the attorney's about 2 o'clock; when, instead of going directly to his lodgings, having the management of a cause in the Sudder Dewanny Adawlut, he went in there, and staid there till about half past 3 or 4 o'clock, as it seemed, to inform himself when it might be expected to come on to be heard, and to apply, as he stated, to that Court for information on that point; and he was arrested as soon as he had left it, and had got into the street.

The case was much discussed at the bar, both on the facts and the

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[1] See *infra*, No. CVII.

law, the principal points being, 1st, whether Reid had come to Calcutta *bonâ fide* under the *subpœna*, and with a real intention of being examined; 2dly, whether he had loitered and wandered too much in his way back to his lodgings; and 3dly, (which was the principal point at last,) whether, supposing his acts were *bonâ fide* with respect to this Court, (which was much doubted by one of the judges,) yet, whether there was any new protection for him in going into the Sudder Dewanny Adawlut.

Upon that point the Supreme Court required of Mr. Reid that he should procure a certificate from the Sudder Dewanny Adawlut[1], stating that he had presented himself before that Court under such circumstances of necessary attendance on his cause, as that if he had been arrested in going from that Court to his lodgings, by any process out of that Court, they would have discharged him; in which case, by courtesy, the Supreme Court would have discharged him from the present arrest.

Mr. Reid did procure a certificate of some circumstances from the Sudder Dewanny Adawlut, as to his application to them, made at the time; but they neither certified as to the propriety or necessity of such

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[1] The points on which the Supreme Court required information from the Sudder Dewanny Adawlut, as stated above, were as follows:

1st, Whether the attendance of Mr. Reid at the Sudder Dewanny Adawlut, on the 15th January 1819, (the day of the arrest, so soon as he had left that Court in his way to his lodgings,) was in the due and regular exercise of his own right, as a suitor of the Court, according to the practice of the Court, for the purpose of making the application to it, which he did then make, of inquiring of the Court whether it would receive his petition, or petitions, on the Monday following the day of such application.

2dly, Whether his attendance for the purpose aforesaid was in the due and regular exercise of his right as a *Mukhtár* for any other suitor of the Court.

3dly, Whether such attendance for the purpose of presenting both, or either, of such petitions to the Court, on the very day of such attendance, was in the due and regular exercise of his right, either as a suitor of the Court, or as the *Mukhtár* of any other suitor.

4thly, Whether, if the said Mr. Reid had been arrested by any process of the Court of Sudder Dewanny Adawlut, at the suit of another person, as he was going home from the said Court after such his attendance for any or either of the purposes, he would have been deemed by such Court to have been, under their privilege, entitled to be discharged by order of such Court.

application, nor that they would have discharged him from their own process under like circumstances; and therefore this Court now discharged the rule for his discharge from custody, with costs.

No. XCVI.

EX-PARTE HEMMING, Registrar.

4th February 1819.

Spankie, A. G., moved upon the Statute 55th Geo. III. for a proportion of the commission to be paid to the Registrar under the following circumstances. On the 20th July, Captain Sparkes was killed in the field, intelligence of which was received at Calcutta on the 19th August. On the 4th September a letter was addressed by his agents, Messrs. Alexander and Co., to the commanding officer in the field, to know if he had left any will there; and on the 9th October the commander sent a copy of the will, which was received in Calcutta on the 28th. In the mean time, on the 19th September, the Registrar had applied, *ex officio*, for administration as to an intestate, and had had no information of any will till the 28th October, when the copy of it was produced. On the 30th December Alexander and Co. received the original will. The registrar had collected a lac of rupees, assets, which fund the real executor had in his hand.

The *Advocate General* contended that there had been no precipitancy in the Registrar taking out administration after a lapse of two months, and no information of any will, and none being left in the hands of the deceased's agents in Calcutta, which was the most probable place of deposit, if any existed.

Fergusson, contra, contended that the Registrar was entitled to no part of the commission, administration having been taken out by mistake by him, when there was in fact a will, and an executor on the spot to execute it: and he argued that the Statute 39th and 40th Geo. III. only applied to the cases of actual intestacy, and the Statute 55th Geo. III. ought not to be extended to a case like this. The Registrar had been precipitate in obtaining letters of administration before information could reasonably be obtained of the fact. It was most probable that the deceased, who was engaged in the field service, would have a

will with him, or lodged in the hands of his commander, in order that, in case of accident, his last orders might be executed on the spot. The Registrar ought to have waited till application had been made to the commanding officer; for it could not be supposed that, in the hurry of military exertions after an engagement, minute and private circumstances of this nature should be attended to in the first instance. As soon as the death of Captain Sparkes was known by the public despatches on the 3d September, his agents wrote on the next day to the commanding officer in the field: until an answer was returned there was a reasonable expectation of finding a will. In ordinary cases there is an affidavit that search has been made (which implies proper search by competent persons, and in probable places) for a will, and none found, and that the party applying for administration believes that there is no will, before any administration would be granted. Such an affidavit could with no propriety have been made in this case. By the Statute 38th Geo. III. a year must elapse from the death before a creditor can apply for administration, with the will annexed when the executor is absent. Here the will was all the while at head-quarters at Nagpore, and there was not reasonable time allowed to send there for it. The commanding officer wrote word, that, from the marching of the corps, it was impossible for him to send a copy of the will before.

The Court saw no actual impropriety in the Registrar's conduct, who had not proceeded till the 19th September, the intelligence of Captain Sparkes' death having been published on the 3d September, and no account of any will by his agents at Calcutta in the meantime, and therefore allowed him one per cent. upon the sum collected by him before probate.[1]

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[1] *Quære*, If it had been made known to the Registrar that the agents had written to head-quarters, whether he ought not to have awaited the answer to their inquiry?

No. XCVII.

W. E. WARD AND RAJAH RAJNARAIN ROY, ONLY SON, HEIR, AND LEGAL PERSONAL REPRESENTATIVE OF COSSINAUT ROY, DECEASED, AN INFANT,

versus

TURRICCHUNDER ROY, ONLY SON, HEIR, &c., OF SIBCHUNDER ROY, DECEASED.

8th February 1819.

THIS was a bill filed in January 1817 for an account on a mortgage, and for foreclosure or sale. The mortgage securities were given by the defendant's father, Sibchunder Roy, to the complainant's father, together with Ward, the co-plaintiff, who was therein joined as a British subject, in order to entitle the real mortgagee to sue in the Supreme Court under the written contract, included in the securities, as with a British subject, pursuant to the reservation in the Charter, and the only question now made was to the jurisdiction, which was laid upon that ground.

Francis Ward, a writer of Mr. Templeton, the attorney, in whose office the deeds were drawn, deposed to his belief, that W. C. Ward was a British subject: he was recited in the deeds to be a British subject, but the witness stated no special grounds for such his belief. There was also an allegation of jurisdiction by reason of the defendant being an inhabitant of Calcutta, as to which the evidence was, that he was an infant, and had never been in Calcutta, but inherited a family house there, in which there were servants living, who were paid wages by his guardians.

On both these grounds *Fergusson* and *Lewin* contended that the jurisdiction was established.

Spankie, A. G., and *Compton, contra*, contended, as to the inhabitancy, that the infant defendant had done no act to shew his election to take to the property in Calcutta, which, therefore, distinguished this from the case of an inhabitancy established by adult traders in a house of business in Calcutta; and that the acts of those in whose power he was, choosing to pay persons for taking care of his house, ought not to conclude him, as the mere possession of property in Calcutta had never been held to make the owner an inhabitant. Upon the other

ground they contended that the Statute 13th Geo. III. c. 63. s. 16. merely gave a power to the native contractor to bind himself, but not his representatives, to a British subject, to submit to be sued in the Supreme Court, though not otherwise subject to its jurisdiction; and no consent could give a greater jurisdiction to the Court than the law authorized. Besides which, they observed that there was no evidence on oath as to the fact of Ward's being a British subject, and therefore, unless the defendant was estopped by such his description in the deeds, it was competent to object to the insufficiency of the evidence in that respect.

All the Court held that the jurisdiction was sufficiently proved upon the basis of the written contract of the defendant's father, made with a British subject, under the clause in the Charter and Act of Parliament, for the very purpose of submitting to the jurisdiction of the Court all controversies between him and his lawful representatives, in respect of the property mortgaged, and the other contracting parties and their lawful representatives. That no sensible construction could be put upon the clause; for it was upon that security, as well as the property, that the money was lent, and the mortgagor's recognition of W. C. Ward being a British subject, as well as the very circumstance of his name being used for the purpose, was ample evidence of the fact.

Note by Sir E. H. East.—Upon the ground of inhabitancy MACNAGHTEN, J., had great doubt, and BULLER, J., gave no opinion; but it appeared to me that that ground was also made out, though the judgment was given on the first ground, on which we all agreed. On the merits the plaintiff obtained a decree.

No. XCVIII.

BUDDEN SOORYE AND ANOTHER

versus

SIR G. D'OYLEY, BART.

5th February 1819.

THIS was an action of trover brought by the plaintiffs, native merchants, against the Collector of the customs at Calcutta, in order to recover S. Rs. 734, the value of 1422 pieces of cloth, which had been seized at the Custom House for non-payment of sufficient duties.

They had been valued by the Government officer at Hooghly, in their transit to Calcutta, at Rs. 612, which was tendered, but by the common course of proceeding such valuation was not conclusive, but a final valuation was to be made at Calcutta. The plaintiffs entered the whole for inspection at the Custom House at Calcutta, without putting any value upon them; and the duty not having been paid upon the full value, according to the subsequent valuation put on the goods, double duty had been demanded, and before this action was brought double duty was tendered, as upon Rs. 1500 value, whereas the value proved by the Custom-House officers themselves on the trial fell short of that sum by about Rs. 100; and upon this evidence, without deciding upon the merits of the original seizure, the Court at the trial gave judgment for the plaintiffs.

Some questions of law arose. 1st. The Statute 53d Geo. III. c. 155. ss. 98—100. enables the Governor-General in Council to impose duties and taxes to be levied and paid by persons subject to the jurisdiction of the Supreme Court, and within Calcutta, &c., "in respect of all goods, wares, merchandizes, commodities, and property whatsoever, also being therein respectively," &c., in the same manner as the Government might impose duties in the Mofussil, provided such duties were first sanctioned by the Court of Directors and Board of Control; and it enables the Governor-General in Council to make laws and regulations respecting such duties and taxes, and to impose fines, penalties, and forfeitures, for the non-payment of such duties or taxes, or for the breach of such laws and regulations, in as full and ample a manner as before; and all such laws and regulations are to be judicially noticed, without being specially pleaded. And all persons may sue in the Supreme Court, &c., all manner of indictments, informations, and suits, whatsoever, for enforcing such laws or regulations, or for any other matter or thing whatsoever arising out of the same. Then it provides (s. 100) that the Company's Advocate-General, &c., may exhibit informations in the Court against any person subject to its jurisdiction, for any breach of the revenue laws or regulations, or for any fine, penalty, or forfeiture, debt, or, sums of money, contracted, incurred, or due, by any such person; and such proceedings shall be had and taken upon every such information as may lawfully be had or taken in the case of

informations filed by the Attorney-General in the Exchequer for any offence committed against the revenue laws of England, &c., as the course and practice of proceeding in the several Courts will admit, &c.

It was objected by *Fergusson*, for the plaintiffs, that this act, though it might incidentally recognize the revenue laws in Calcutta before issued, yet, as it only gave a right to sue for the penalties, it gave no right and did not authorize the seizure of the goods for the breach of the revenue laws.

The Court, however, were of opinion that the right of detention of the goods till the duties could be ascertained, and till payment of the proper duties, was necessarily implied; and that the only question was, whether the duties claimed were properly due: and farther, as the plaintiffs were ready to pay, and had actually tendered the double duty upon a certain amount of value, the question was now reduced to one of value only.

On the other hand it was objected by *Spankie, A. G.*, that the Supreme Court had no jurisdiction to try the present action, all matters of revenue being excluded from its jurisdiction by the Statute 21st Geo. III. c. 70. s. 8., and this question arising incidentally out of the revenue regulations, Reg. XXXIX. of 1795 s. 22, Reg. XI. of 1800,[1] Reg. X. of 1801[2], and Reg. XI. of 1801[3], confirmed by the Statute 37th Geo. III. c. 142. s. 11., as to Madras and Bombay, in respect to acts done within, as well as without, the jurisdiction. He contended that it was impossible to decide the present action without deciding upon the construction of the revenue regulations, and thus exercising the very jurisdiction which was taken away: for if actions of trespass or trover might be maintained against those who execute those regulations, the whole revenue might be drawn into jurisdiction. The Statute 53d Geo. III. c. 155. ss. 98. and 99., explained as to the antecedent duties imposed in Calcutta by the Statute 54th Geo. III. c. 105., adds to, but does not take away, any prior right of the Government to levy its revenues, nor does it take away the general restriction before imposed by the Supreme Court, except so far as enabling the Company's Advocate-General to sue in their names for any breaches of the law; and the plaintiffs were

[1] Rescinded by Sec. 2. of Reg. IX. of 1816. [2] Rescinded by Sec. 2. of Reg. X. of 1810.
[3] Rescinded by Sec. 2. of Reg. IX. of 1810.

not without remedy; for by Reg. XXXIX. of 1795 they might sue for redress in the Zillah Court of Hooghly. The Statute 53d Geo. III. only repeals the Statute 21st Geo. III. so far as regards the raising and enforcing the revenue in Calcutta, but it equally excludes the right of action of the subject: the latter words of s. 99. are to be construed suits &c. *ejusdem generis*, that is to say, for enforcing such laws.

The Court, however, were clearly of opinion that the subject had a right to seek redress in this Court, if money were levied on him, or his goods detained, without any authority from the regulations of Government for raising the revenue; otherwise he would be left without redress for acts of oppression and injustice committed in Calcutta. It was, therefore, so far necessary to look into the revenue laws passed at Calcutta as to see that a man's property was held from him with the sanction of those laws, and not by a mere wrongful act without even colour of authority. Now here, without entering into the question whether the double duty had attached upon the fair application of the regulations (which was not clear), the plaintiff had submitted to pay the double duty; and it appeared that the amount tendered was calculated upon the assessment of the Government officers and assessors themselves; and the withholding the goods, notwithstanding such tender, upon an arbitrary demand of a higher sum, was an act of wrong without even colour of authority; and it was nothing to object that the Government might have proceeded as for a forfeiture of the goods, for they had not in fact so proceeded, but merely as for the double duty, which was agreed to be paid, and was proved to have been fully tendered by the plaintiffs, for whom judgment was accordingly given.

In the following term (4th March 1819) the Advocate-General moved for a new trial, in order to take the more solemn opinion of the Court upon the questions of jurisdiction, and re-stated his argument.

The Court gave him a rule to shew cause, in order to settle the question, and the rule was, after argument, discharged.

No. XCIX.

ROOPCHURN ROY

versus

RUSSOO DAY AND SREE MUTTY BISSEE DOSSEE, WIDOW AND LEGAL REPRESENTATIVE OF PEERBOORAN DAY, DECEASED.

3d Term 1818.

THE complainant, by his bill, filed the 22d December 1817, prayed that Sree Mutty Bissee Dossee might confess assets of the estate of Peerbooran Day, come to her hands &c. as his widow and legal representative, sufficient to pay off and satisfy the principal and interest of his bond to the complainant; and also set forth an account of his real and personal estate &c., and how it had been applied, and pay the said bond, conditioned &c., for S. Rs. 30,650 and interest, and for general relief.

The defendants, by their answer, confessed assets to more than the amount of the plaintiff's demand.

And it was now moved that it should be referred to the Registrar to calculate the principal and interest due on the bond, in order to save the expense of accounting before the Master, which was ordered accordingly, as warranted by precedent.

No. C.

RAMOHUN PAUL

versus

CARRAPIET SARKIES AND OTHERS.

17th June 1819.

A WRIT of sequestration had issued against Johannes Sarkies, one of the defendants, for want of appearance; after which, and before notice by the Sheriff to the debtors, whose debt (being a contingent one upon his life insurance for a year by the Life Insurance Company) was to be sequestered, Johannes Sarkies died; on which

Ferguson moved, on a former day, for a rule on Messrs. Mackintosh and Co., the insurers, to shew cause why the money should not be brought into Court, to abide the event, as a security for the plaintiff's demand, as the effects of the deceased would be liable for his debts.

Spankie, A. G., and *Compton* now shewed cause and contended—1st. That if Johannes Sarkies had been still alive this was no debt, but a mere possibility, and therefore it could not be seized or sequestered as a debt under the Charter: 2dly, That Johannes Sarkies having died, the writ of sequestration to enforce his appearance necessarily became inoperative.

The Court, on the second ground, discharged the rule, with costs.

No. CI.

KURIMMOOLAH KHAN AND MAHBOOBUNISSA
versus
HUTTON AND OTHERS.

8th July 1819.

In this case the first count of the declaration stated a bill of exchange, drawn by Forbes and Co. on the 25th March 1819, at Bombay, on the defendants (merchants at Calcutta), requiring them, at thirty days' sight, to pay S. Rs. 10,000 to Agha Mahomed Shoostree, or order, for value in account to Dr. Gideon Colquhoun.

That Agha Mahomed Shoostree indorsed the said bill, and directed the money to be paid to Ahmadoolah Khan or order.

That afterwards, on the 15th April 1819, the said bill, with the indorsements thereon, was presented to the defendants for acceptance, and they accepted the same; and that when the said bill was so made, indorsed, and accepted, as aforesaid, the said Ahmadoolah Khan was dead, and that the plaintiffs (his father and widow) were his legal representatives, of all which premises the defendants had notice, and thereby became liable to pay the money to the plaintiffs, as the legal representatives of Ahmadoolah Khan.

Fergusson, in opening the case for the plaintiffs, said that the death of the party in whose favour a bill was drawn or indorsed at the time made no difference, by the law of merchants, as had been determined in *Rawlinson* v. *Stone*; 3 Wils. 1; in which case it was held, that, according to the custom among merchants, on the death of the holder of a bill it passed to his representatives, and that this was the same, for in the case of foreign bills it must constantly happen. He then called witnesses to prove the necessary handwritings, and

that the two plaintiffs, the father and widow of the deceased indorsee, who had died about a month before the 15th April, the date of the acceptance, were his only remaining relatives. But a witness also proved that about half an hour before his death Ahmadoolah had appointed four persons, whose names were written on the back of the bill, to collect his debts, and to pay what he owed, directing them to pay over the balance to his widow.

Upon the evidence of this last witness a question arose, whether the action ought not to have been brought by those four persons; and the following questions were put to the Court *Maulavi*—

1st. *Q.* Can a Musulmán, having a father and widow, direct, on his death bed, that his estate shall be administered by four other persons, so as to vest in those four persons the exclusive right to sue?

A. The action is to be brought by the heirs. The agents so appointed could only bring the action on behalf of the heirs.

2d. *Q.* Can the heirs bring the action in their own names?

A. They can. The heirs are to bring the action.

3d. *Q.* How would it be if a will were made appointing an executor?

A. It makes no difference, the executor cannot bring the action in his own name.

4th. *Q.* Might an action be brought by a creditor of the deceased?

A. An action may be brought by a creditor of the deceased against any person who has any property of the deceased in his hands.

There was then some correspondence proved between the plaintiffs and defendants, in which the latter promised to pay the bill if the former were entitled to receive the money.

Several merchants of the city of Bombay were then called to prove the custom of merchants in the case of the death of the payee or indorsee; these were,—Mr. Laurletta, a Spanish merchant, and agent to the Spanish Phillippine Company, who spoke to one instance, in particular, of a payment of a bill made to himself as executor of the payee, who was dead at the time of the bill being drawn. He had received the amount of bills of exchange from Government under similar circumstances. Mr. Fulton, an eminent agent and merchant for thirty years, had known instances of the kind, though he was not able to particularize them, but never heard of any objection made to pay the bills to the representatives of the

deceased person, who was entitled, if living, to receive the money. Mr. Palmer, also a considerable merchant and agent since 1793, in Calcutta, said that, according to all his information and experience, the representatives of a deceased payee of a bill, who was dead at the time it was drawn, had always been considered entitled, by the usage of merchants, to receive the amount.

The Court were all of opinion that the plaintiffs were entitled to recover, and gave judgment for them, and would also have given them costs; but upon the defendants agreeing to submit to the opinion without further objection, the judgment was taken without costs.

No. CII.

RAJAH RAYKISSEN

versus

JOYKISSEN SING AND OTHERS.

1st July 1819.

THE plaintiff had instituted a plaint in the Court of Requests for small debts, the object of which was to recover certain rents of small amount individually, but touching a contested right of great consequence, whereupon

Fergusson moved, on behalf of the defendants, after a *certiorari* issued and a return made of the cause, for a rule calling on the plaintiff to shew cause why the plaintiff below should not file his plaint in the Supreme Court, and proceed there, or otherwise, for a prohibition.

It was afterwards agreed to stay proceedings below.

No. CIII.

DOE DEM. JUGGOMOHUN CHATTERJEE

versus

GURUPERSAUD DAY.

22d July 1819.

THE lessor of the plaintiff claimed and brought this ejectment to recover one-third of an undivided estate in Calcutta, under a bill of sale made by the Sheriff under a judgment and execution of a creditor against Bolonaut Day, whose property it had been.

Spankie, A. G. objected, on the part of the defendant, that the Sheriff

could not convey the title to the premises themselves, but only the right and interest of the party.

The Court overruled the objection, on the ground that the 15th clause of the Charter directs the Sheriff to seize and sell.

The case was then tried on the merits, and judgment given for the lessor of the plaintiff with costs.

No. CIV.

ZIBAH MUCKERTICK
versus
MINAS ARATOON.

27th July 1819.

In assumpsit on promissory notes, and on the money counts, and plea of non-assumpsit, the question turned upon the jurisdiction which was alleged to be against the defendant, as an inhabitant of Calcutta.

It appeared that the defendant, an Armenian, lived in Calcutta about seven or eight years previously to the action being brought, first in his own house, which he afterwards sold, and then in his wife's house, which had been given to her children by her mother. After staying in Calcutta about a year, the whole family, including their children, removed to Dana, and he left an agent at Calcutta to collect the rents of three houses which belonged to the children. About five years before the action was brought the wife left him against his will, and, bringing some of the children with her, resided with them in one of the houses in Calcutta, and possessed herself of one of the other houses, and received the rent of it by the husband's consent, but they had agreed to live separate.

The Court held that the jurisdiction was not proved, as she was no longer to be considered as part of his family, nor could her residence be deemed his. The plaintiff, accordingly, was nonsuited with costs.

No. CV.

IN THE GOODS OF BIBEE HAY *alias* BIBEE HANNAH.

3d Term 1819.

Letters of administration were applied for on the part of the Registrar of the Court, against which a *caveat* was entered by a Musul-

mán woman of the name of Jaun Bibee, who had been purchased by Bibee Hay when an infant, and brought up and educated by her.

On the part of the Registrar affidavits were read: one, by a servant who had lived with Bibee Hay for thirty-six years, stated that Bibee Hay had borne a male child to a Mr. Robinson, an English gentleman, with whom she was living, which child was baptized by the name of James Robinson; that the son went to England for his education, and is supposed to be now living there; that thirty-two years ago she had purchased Jaun Bibee, then an infant, and had afterwards given her in marriage, but that, when applied to by Jaun Bibee for a provision for her maintenance, Bibee Hay had answered that she could do nothing more for her, as she had a son living in England to whom she meant to give every thing that she had, and this she had declared two or three times.

On the other hand, the affidavits of several persons were read, of declarations by Bibee Hay, fourteen years ago, that she had adopted as her son Shaick Deen Mahomet, the father of Jaun Bibee (though there is no such thing as adoption by the Musulmán law), and that she had all along treated Jaun Bibee as her natural granddaughter; that she had been often heard to say that she had no relatives except Jaun Bibee and her two children, who would be entitled to all her property.

Spankie, A. G., and *Compton*, for Jaun Bibee, contended that this was at all events a good parol testamentary disposition of Bibee Hay's property to Jaun Bibee; that her natural son, even if he were living in England, could not interpose any claim to her property by the Musulmán or British law; that a verbal declaration of succession to property by a Musulmán was good; that, at any rate, the Registrar could have no authority, either under the Charter or the Statutes, to take out administration to the property of a Musulmán, his authority in that respect being confined to British subjects; that, even under the general ecclesiastical authority of the Court, there was a marked distinction between foreign Europeans or Christians, and Musulmáns or Hindús, the latter of whose laws of inheritance and succession were expressly reserved to them by the Charter and the Statute 21st Geo. III. c. 70. s. 17., which extended the jurisdiction of the Court to the native inhabitants of Calcutta; and that these were only subjected to the criminal jurisdiction of the British laws.

The Court, in the course of the investigation, put these questions to the Court *Maulaví* in attendance—

1st. *Q.* Can a Musulmán make a will by parol?

A. It makes no difference whether his will be declared in writing or by parol; but whether in the one or the other case there must be two witnesses to it.

2d. *Q.* Would a natural child of a Musulmán woman, by a Christian, be entitled to inherit to her property?

A. Not so if brought up as a Christian.

3d. *Q.* Could she make a will of her property if she had such a son?

A. She could make a will in any case.

The Court (East, C. J., Buller, J., and Macnaghten, J.,) seemingly inclining to support the jurisdiction, and not being satisfied that the Registrar could take out administration to a Musulmán under the restriction in the Act, proposed to refer it, and it was at last agreed to be referred to the *Maulaví* to inquire concerning the fact, and the validity of the will of Bibee Hay.

Some arrangement was afterwards made.

No. CVI.

KERTYCHUNDER HOLDAR
versus
TERRACHUND BOSSE AND MOHUN MISTREE.

4th Term 1819.

The plaintiff, in July 1819, brought an action in the Court of Requests against the defendants for S. Rs. 103, the value of Chunam bricks and sand sold and delivered. The defendants applied for an order for the removal of the cause into the Supreme Court by writ of *certiorari*, insisting upon it as a matter of right, and *Fergusson* cited Tidd's Practice, 395, in proof that it lies in all cases.

The plaintiff, a poor man, being unable to bear the expense of prosecuting his claim, here petitioned the Court to be allowed to proceed in the Petty Court; and after looking into and considering the authorities,

The Court were clearly satisfied that they had authority to refuse a *certiorari* in their discretion. They considered that, to grant it in such a case as the present, would be, in effect, to counteract the spirit and inten-

tion of the Legislature in the erection of the Petty Court to try small causes, where the amount of the debt was too inconsiderable to incur the costs of suing before the Supreme Court, and the costs were utterly beyond the power of such suitors to defray.

They therefore discharged the rule for the *certiorari*.

No. CVII.

EX PARTE REID.[1]

25th October 1819.

East, C. J., delivered the opinion of the Court in this case.

The Advocate-General had moved, on a former day, that Mr. Reid should be brought up by writ of *habeas corpus ad testificandum*, he being a prisoner in custody in execution, and having an intention of making an application to the Court in a suit pending against himself.

A question arose on the course of this proceeding, of which we have lately had several such attempts. It has frequently been granted in like cases upon motion as a matter of course; but objection was started, that, if it were grantable of course, upon the mere suggestion of the party in execution, it might be done continually for frivolous or vexatious purposes; and unless security were given to the Sheriff, it must be done either at the risk of him, or of the plaintiff at whose suit the prisoner was in custody. If the Court should be of opinion that, under the circumstances, an application of this sort is made for fraudulent, frivolous, or vexatious purposes, it is competent to them to refuse it; but they will not, *à priori*, make such a presumption: and, for their reasonable satisfaction in this respect, it would seem proper, in all cases where the presence of the prisoner in Court is necessary for the purposes of justice to himself, to advert to the practice which has prevailed in the Court of King's Bench, where a prisoner applies for a day rule for the purposes therein alleged, of treating with his creditors, advising with his counsel, and prosecuting his suit in Court. Such a petition is signed by the prisoner, and presented to the Court, in order to entitle him to a day rule, which is thereupon granted according to the rules of practice which are peculiar to that Court. With respect to the prisoner,

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[1] See *supra*, No. XCV.

whose testimony is required for the purposes of justice between other parties, there has always issued the writ of *habeas corpus ad testificandum;* but though the common form of the writ, as stated in Impey's Prac. 40, and Tidd's App. c. 35. s. 21., states a cause then depending, yet it may apply as well to a cause in which the person who is "to testify to the truth according to his knowledge" (the object stated in the writ) is one of the parties, as otherwise, where, by the course of the Court, such affidavit by the party is receivable, as in all summary proceedings by rule or motion before the Court.

But in the case of other parties than the prisoner himself, whose testimony is wanted, such a writ cannot be obtained without an affidavit, on the part of the person requiring his evidence, that the witness is a material one. Impey 406 cites Forst. 396; that was the case of *The King* v. *Layer*, m. 9. G. 1. The application was made on behalf of the prisoner, then under commitment for high treason, for writs of *habeas corpus* to bring up Lord Orrery and Lords North and Grey, then also prisoners in the Tower, *ad testificandum*, when the rule I have stated was recognized and confirmed, and a Commissioner was sent to Layer to take his affidavit, and he made an affidavit to that purpose; for otherwise, as the Court said, they might deliver all the gaols in England upon a bare surmise. That, it is true, was a criminal case, where the Court will exercise great strictness as to the safe custody of the prisoner; but it is also necessary to be vigilant and watchful in the case of prisoners in execution for debt, where every indulgence of this kind is to be exercised at the peril of other persons; for the Statute 8th and 9th Will. III. c. 27. declares it to be unlawful to take a prisoner out of civil custody in execution.

Originally all affidavits were necessarily to be made before the Court or a Judge, but the difficulty was lessened by the Statute 29th Car. II. c. 5., which enables the Judges of the Courts of King's Bench, Common Pleas, or Exchequer, by one or more commissions under the seals of the respective Courts, "from time to time to empower what, and as many, persons as they shall think fit and necessary in all the towns and shires in England and Wales, and town of Berwick-upon-Tweed, to take and receive all and every such affidavit as any person shall be willing and desirous to make, before any of the persons so empowered,

in or concerning any cause, matter, or thing, depending, or hereafter to be depending, or otherwise concerning any of the proceedings to be in the said respective Courts, as Masters of Chancery in extraordinary do use to do, &c." In 2 Salk. 461. Ca. 2. it is said that this is confined to matters pending in Court.

Upon the whole, therefore, it seems proper, as we have no such proceeding in the Supreme Court as day rules, nor have been in the practice of issuing permanent commissions for the purpose of taking affidavits, that we should adopt a course of proceeding that will best supply the want of either, and while it will afford a reasonable convenience to prisoners in custody under civil execution, will also supply some check to the abuse of the present practice.

We shall therefore order the Under-Sheriff for the time being to take all affidavits of prisoners in custody.

No. CVIII.

MANICK ROY

versus

BAUDLEY RAUR, WIDOW AND LEGAL REPRESENTATIVE OF BUXOO SERANG.

Sittings after Fourth Term 1819.

ASSUMPSIT on a special agreement that the plaintiff, on the 19th November 1816, at the request of Buxoo, in his lifetime, had delivered to him a certain bond of one Ebram Corye for S. Rs. 1401, in order to procure payment thereof from the said Corye, then in parts beyond the seas, for a commission and reward to him, Buxoo, of Rs. 3.

Buxoo promised the plaintiff that if he, Buxoo, obtained payment of the amount of the bond at the expiration of six months, he would pay the same to the plaintiff; and if not, that he would bring back the bond and restore it to the plaintiff: and the plaint averred, that although Buxoo, on the 19th May 1817, obtained payment of Ebram Corye of the bond and interest to the amount of S. Rs. 2115, and although plaintiff was always ready to pay Buxoo the said commission, yet neither Buxoo in his lifetime, nor the defendant, his widow, since his death, paid the said money to the plaintiff.

There were also other counts.

To this there was only a plea of *plene administravit*, on which the replication took place.

It was contended at the trial that the single plea of *plene administravit* admitted the debt, and reduced it to a question of damages; but the Court had some doubt whether it was not still necessary to shew the circumstances of the case, in order to enable them to form a proper estimate of the damage; and, after hearing the evidence, they were so little satisfied with it, that, unless they were bound by the pleadings to find the agreement as laid, and that it was broken, as stated, by not paying the money, or returning the bond stated, they would have nonsuited the plaintiff.

The defendant having proved her plea of *plene administravit*, the plaintiff's counsel contended that he, the plaintiff, was entitled, upon the whole, to a verdict and judgment of assets *quando*, in order to save another action.

The Court took time to consider on these points; and in the 1st Term 1820, after looking into the authorities, gave judgment against the plaintiff.

No. CIX.

RAJAH RAMENDERDEB ROY AND OTHERS
versus
KISTNOMOHUN BONNERJEE.

Sittings after 4th Term 1819.

THIS came on upon a plea to the jurisdiction, which stated that "the defendant is a Hindú native of India, born at *A B*, in the Zillah of Burdwan and Province of Bengal, and that he was not, at the time of filing the bill of complaint, nor at any time since, nor is he now, an inhabitant of the town of Calcutta, nor a person in any manner subject to the jurisdiction of this Court;" and then went on to shew that he was subject to another jurisdiction. It appeared, in evidence, that the defendant's family house was at *A B*, on the other side of the river, opposite Calcutta; but it also appeared, from the depositions, that for two months and more (including the time of filing the bill) he slept at the house of one Purdoo Raur, whom he kept as a mistress, in Calcutta, and was seen there by many persons night and morning.

The Court held the jurisdiction sufficiently proved, but, at the instance of the defendant, granted an issue.

No. CX.

WOOMISCHUNDER PAUL CHOWDRY AND ANOTHER

versus

PREMCHUNDER PAUL CHOWDRY AND OTHERS.

13th January 1820.

THE complainant in this case filed a bill for account and partition of family property, and, pending the suit, he was guilty of the great outrage of proceeding one morning early to the *Daftar Kháneh* of one of the defendants, with many of his people, some being armed, when he compelled the servants of the defendants to open the treasure chests kept there, and took away money and securities to the amount of above six lacs of rupees. There had been a decree to account passed in the suit, and under an order of the Court the trade was directed to be carried on for the joint benefit of all, as in the lifetime of the ancestor.

At first an application was made to commit the plaintiff at once; but upon consideration the Court made the order on the complainant to deposit the money and securities with the Registrar of the Court *instanter* (*i. e.* by six o'clock in the evening), or to stand committed for his contempt; considering that it was an attempt on his part by force to supersede or suspend the judgment of the Court in a suit pending, the offence being aggravated by the bill for an account and partition having been filed by himself; and the excuse offered, that he was entitled to a larger share, of which he could not obtain any part from the defendants, being of no weight under such circumstances of outrage and contempt.

On Monday the 24th January it was stated in Court that the securities and money had been deposited with the Registrar (some delay having been occasioned by some of them having been passed away to others), when the Court directed them to be paid and handed over entire to the defendants, out of whose custody they had been so taken.

And the order against the complainant was then discharged, on his paying all the costs incurred.

No. CXI.

DOE DEM. MONGOONEY DOSSEE AND ANOTHER *versus* GOOROOPERSAUD BOSE.

27th January 1820.

THIS was an ejectment brought by the widow and daughter of Goculchund to recover 6 *Cottahs* 10 *Chittacks* of ground in Calcutta, being their share of a patrimonial estate consisting of 2 *Bighás* 14 *Cottahs*, granted by the Honourable Company many years ago to two brothers, Bridgenaut and Juggulkissore. Thirty-four years ago, and four years after the death of Juggulkissore, the land was divided by Bridgenaut into two shares amongst his three nephews (sons of Juggulkissore), reserving no share for himself—to the eldest nephew Bopoo, 1 *Bighá*, 9 *Cottahs*, 12 *Chittacks*; to Muddunmohun and Ramdhone, the two other nephews, he gave the remaining undivided share of 1 *Bighá*, 4 *Cottahs*, 4 *Chittacks*. First, Bopoo Deb (or Gorbmoney, as he was also called) died, leaving three sons, Gooroopersaud and two others. Secondly, Muddunmohun died, thirty-two years ago, leaving a widow, Ramoney, and Goculchund, a son; which Goculchund was the husband of one of the lessors, and the father of the other, who died seven years ago. Thirdly, Ramdhone died fourteen years ago, leaving a widow and a daughter.

There was no question as to the title of the lessors to the portion of the family estate claimed by descent through Goculchund; but the defendant claimed under a purchase made eighteen or nineteen years ago, for a valuable consideration, while Ramdhone was the head of the undivided family, to whom the consideration money was paid. The family were at that time in distressed circumstances, and the sale was made *bonâ fide* by Ramdhone, as manager of the family, with the consent of Muddunmohun's widow, Ramoney, and in the presence of Goculchund, her son, then an infant of the age of thirteen or fourteen years. The immediate occasion, however, of the sale was, that Ramdhone had become security for a third person, who had died, and he was called upon to pay the money, which he had no other means of doing than by the sale of this property; but to obviate any difficulty on this account as against Goculchund, the infant, it was plainly proved

that he continued to live with Ramdhone and with his mother, near the premises which were sold, for twelve or fourteen years after the sale, and therefore for ten years, at least, after he came of age, and until his death, seven years ago, without ever making any objection to the sale, though Goculchund's mother used to complain that the house and ground had been sold for less than its worth, and there was plain evidence that Goculchund knew of the sale.

On this ground the Court held, that the acquiescence of Goculchund in the sale for ten years after he came of age, with the knowledge of the fact, was a confirmation of it, and nonsuited the plaintiff.

No. CXII.

KISSENCHUNDER ROY

versus

SURREPCHUNDER MULLICK.

10*th February* 1820.

THIS was an action of assumpsit on the common money counts, *inter alia*, for money paid by the plaintiff to the defendant's use.

The plaintiff was surety for the defendant to Rajnarain Sein, of the house of *A B* and Co.; and the defendant not having accounted to the house for the money received by him from the customers, to the amount of S. Rs. 10,079, the plaintiff was called upon to pay, and did pay, that amount, as surety for the defendant; but the witness proved that it was paid in Company's paper, which he received as money from the plaintiff, allowing him the usual discount.

Two objections were taken on the part of the defendant: 1st, That this evidence of having paid Company's paper for the defendant did not support the count for having paid money for his use; 2dly, That the action ought to have been upon the special agreement in writing to indemnify the surety (which was also shewn), and not on the general money count.

The Court overruled both objections.

No. CXIII.

DOE DEM. GOLAUM AUBBUS
versus
SHAIK AUMEER.
THE SAME
versus
TAMBOO BIBEE.

15th February 1820.

THESE two ejectments were tried together, and the first involved a question of succession to property by the Muhammadan law.

The proprietor last seized was Fyzoo, and the state of the family was this. There were three brothers; the first of whom, Golaki, had three daughters, two of whom died before Fyzoo, the son of the second brother, one of them leaving a son: the third daughter survived Fyzoo. The second brother, Shaikoo, had a son, the above-mentioned Fyzoo, last seized of the property: he died, leaving his mother and a widow, having had a son who died in his lifetime, leaving Tamboo, his widow, but no issue. The third brother, Shirauz, had a son, Golaum Aubbus, and three daughters, living at the time of the action brought, two of whom had issue.

Fyzoo's father and his two uncles all died before him.

This question was put to the *Maulaví* in Court—

Q. In collateral descent will sisters inherit with brothers?

A. It will depend upon whether the brothers and sisters survive the person from whom the property is to descend. If they do survive, the children of the brothers will take two-thirds, and the children of the sisters one-third; but a man dying, leaving the son of a brother and the son of a sister (the brother and sister being dead), the son of the brother will take all, their parents having died before them.

After further explanation with the *Maulaví*, concerning the application of the rule to this case, he said the property was to be divided into twelve shares, of which four were to be given to Fyzoo's mother, three to his widow, and to Golaum Aubbus (the lessor), five.

The *Maulaví* had at first given only two shares to Golaum Aubbus, and one each to two sisters of his, on the supposition that those only had survived Fyzoo, and one other to Golaki's daughter, who survived

Fyzoo; but he afterwards corrected his distribution as above, thus excluding altogether Tamboo, the widow of Fyzoo's son, who had died in his father's lifetime without issue; and ultimately Golaki's daughter and Golaum Aubbus's sisters got no shares. Thus the rule of the *Maulavi*, above stated, was applied by him in the same manner to Fyzoo, the son of Sheikoo, as if the person last seized had been Sheikoo himself, who had survived his two brothers, Golaki and Shirauz.

The Court, on this opinion, gave judgment against Shaik Aumeer for five-twelfths of the undivided share of five *Cottahs* possessed by him. But in the ejectment against Tamboo, a mortgage by Fyzoo to her and two others having been proved, judgment was given for the defendant.

No. CXIV.

COLLYPERSAUD MOOKERJEE

versus

KHETTERPAUL SIRCAR.

2d Term 1820.

In assumpsit against a Hindú heir, it is not necessary, though the promises are laid in the time of the ancestor, to allege assets come to his hand, but he must plead no assets or *plene administravit.*

No. CXV.

SHIBERPERSAUD DOTT AND ANOTHER

versus

TARRAMOONEY DOPEE AND ANOTHER.

2d Term 1820.

Exceptions to the answer of a Hindú manager were allowed, where the answer raised the question whether such manager could take a portion of his share of the joint estate and lay it out for his separate benefit. The answer at any rate was deemed insufficient, as not being distinct to many particulars to which it assumed to apply.

No. CXVI.
GOURBULLUB
versus
JUGGERNAUTPERSAUD MITTER AND OTHERS.

2d Term 1820.

A PLEA of a former decree was overruled, because the plaintiff (the former defendant and an infant) had not a day given to him to shew cause after he came of age against the decree, which, though nominally made against his mother (who only claimed title for her son), dispossessed the infant of his inheritance.

No. CXVII.
JOMOONAH DOSSEE
versus
BYCAUNTNATH PAUL CHOUDRY AND ANOTHER.

2d Term 1820.

Quære, Whether a mother has a right to be a party to a suit between the sons for a partition, they intending, by a juggle, to oust her of her share? But she cannot by her bill pray for a partition, though she may be made a party, but she shall have all costs and full maintenance till partition.

No. CXVIII.
RAMRUTTON MULLICK
versus
EAST-INDIA COMPANY.

Sittings after 2d Term 1820.

THE bill, in this case, was dismissed, the plaintiff having incurred a penalty, as stated, *i. e.* his advance on a contract of purchase of goods, for not having completed his purchase in time.

After further time and much negotiation the complainant left it to the decision of the Governor-General, who decided against him.

The Court held that he was bound, especially after an acquiescence of several years.

No. CXIX.

GOVINDCHUND SEIN, Son, Heir, and Legal Representative of AMEYCHUND SEIN

versus

SIMPSON.

Sittings after 2d Term 1820.

This was an action of assumpsit upon a promissory note for Rs. 6000, drawn by the defendant on the 7th Sept. 1810, payable to Ameychund Sein two months after date.

The handwriting of the defendant was proved, and that the plaintiff was his eldest son; that Ameychund died before the action was brought, leaving three sons, the eldest of whom, the plaintiff, was of age; the second died at the age of eighteen, four years after his father, without widow or son; and the third, a boy of ten years old, was still living. The plaintiff, as eldest, managed the family since his father's death, and was, at the time the action was brought, about twenty-two.

An objection was taken at the trial that the action ought to have been brought in the name of both the surviving sons, they constituting but one heir by the Hindú law; but a verdict was taken for the amount of the note and interest, subject to this question.

In the 3d Term 1820 a rule nisi was obtained for entering a nonsuit; against which, on Thursday, the 22d June,

Fergusson and *Money* shewed cause. This is like the case of executors in England: if one only sue, the defendant can only take advantage by plea in abatement if there be another executor; and it is different from the case of partners, where one alone cannot sue, because that is a case of controul, and sparing another party makes a variance in the contract; but here the contract declared on is with the father only, and the promise is laid to him. The eldest son being the managing owner, according to the Hindú custom, is the ostensible person to sue for debts; for he could have even sold the father's property to pay debts, and he can give a discharge to a debtor: therefore the defendant cannot be injured, for he may plead this recovery by the managing owner.

Spankie, A. G., contra. The defendant will be put to a difficulty, for he can only plead this recovery by making averments of fact, which, at a distance of time, it may be difficult for him to prove. Be-

sides, the same answer, if good, would apply equally to the case of partners, one of whom alone, it is admitted, cannot sue for a joint debt; and the case of Hindú heirs is more like partners than executors. Each of several executors may dispose of the assets for payment of debts. *Scott* v. *Goodwin.* 1 Bos. & Pull, 67. 72. Here was no express promise proved to pay the plaintiff alone, and the promise implied by law is to pay all the sons, who only make one heir.

The Court considered this more like the case of executors than partners, and the decision in the former case more analogous to the case of a Hindú manager of a family, who acts ostensibly on the part of the family with the public in all joint concerns; and they therefore discharged the rule for entering a nonsuit, and gave judgment for the plaintiff, but without costs, it being a new point.

No. CXX.

MUDDOSOODEN GHOSE
versus
GEORGE GIBSON,

N. B. This case has been reported *supra*, No. XXI.

No. CXXI.

BUNGSEEDER SHAW AND ANOTHER
versus
TICKMAN BUCKETT AND ANOTHER.

3d July 1820.

This cause came on upon a rule to shew cause why a warrant of attorney for confessing judgment, and the judgment entered thereupon should not be set aside. It was grounded on the facts that the defendants lived at Ghazipore, but had a house of trade at Calcutta; that their *Gumáshtah* was one Sunkaram, who had given the warrant of attorney in the names of the defendants, his employers, but, as was deposed in the affidavit of one Sabichund, their present *Gumáshtah*, without the authority of his principals, and after he, Sabichund, had arrived at Calcutta, with authority to supersede Sunkaram; and also upon a general allegation that the *Gumáshtah*, so circumstanced, had authority to pay

and receive money, and to buy and sell goods, for their principals, yet that they had no authority to bind them by such an instrument as this, which was not known to the Hindú law, and precluded trial.

On the other hand it was sworn that Sunkaram was not dismissed from his employment at the time the warrant of attorney was given; and this was plainly evidenced by letters addressed to him on the business of his employment, subsequent to the time of his supposed dismissal in his character of *Gumáshtah*, and it otherwise appearing that he alone acted as such after that time; that the debt of the plaintiff was fair and just; and that they agreed to take this security for the advance made by them to enable the business to be carried on, and to save the expense of being sued by others; and there was also a general deposition that *Gumáshtahs* had a general authority to bind their principals in all matters proper and necessary for carrying on the business.

Fergusson in support of the rule, *Spankie, A. G.*, and *Hogg* against it.

The Court offered to the defendants' counsel to adopt any mode he could suggest, by issue, plaint, or otherwise, for trying the justice of the plaintiffs' demand; offering, in the meantime, to retain the money which had been levied in the Sheriff's hand to abide the event.

But any trial being declined, after further consideration,

The Court said, that without deciding any point of law as to the legality of such a security between Hindús (it being a power of attorney under seal, without any authority under seal to the person giving the power, though it did not appear that it was necessarily under seal), they would not set aside the judgment and execution, but leave the defendants to their legal remedy against their *Gumáshtah*, if he had exceeded his authority; and the rule was accordingly discharged.

No. CXXII.

RAJNARRAIN GHOSE

versus

REID AND OTHERS, Executors, &c.

11*th July* 1820.

A Bill was filed for the execution of a mortgage deed, and for foreclosure, &c.

The answer by Reid, as executor and trustee of Foster, was, in sub-

stance, that Foster was not seised in fee of the premises at the time of the deeds of lease and release, in February 1807, because he had before, namely, on the 16th and 17th July 1805, conveyed the premises, mortgaged to the complainant and the defendants, in trust for certain persons who were the natural children of Foster, the consideration of which trust-deed was stated to be natural love and affection, and by way of part provision for them. And in answer to the objection that this was no more than a voluntary settlement, and void as against creditors at the time (as the plaintiff was), there was also shewn, on the part of the defendants, another conveyance of the same date, from a woman of the name of Naney Lack (who was a Musulmán native woman, and the mother of the children), whereby she conveyed an estate at another place (Bhowanypoor) to the same trustees, for the same children; and upon this it was contended by

Spankie, A. G., Compton, and *East,* for the defendants, that though, according to *Doe dem. Otley* v. *Manning,* 9 East, 59, a voluntary conveyance after marriage in favour of legitimate children was void against a subsequent purchaser, even with notice; and that, though a settlement on a wife and children was void against creditors at the time; yet that here there was a valuable consideration given for the settlement by a third person, namely, Naney Lack, who had conveyed her own estate to the children in consideration of this conveyance by Foster to them of his estate; and that though this consideration was not expressed in the deed, yet parol evidence might be given of it (and parol evidence was, in fact, given to that purpose), and it was supported by the identity of the dates, the trustees, and the objects of the settlement.

Fergusson, Lewin, and *Hogg,* for the complainant, denied that the conveyance of Foster to the trustees was to be taken to be made upon a valuable consideration from a third person, so as to take the case out of the rule, by reason of Naney Lack having also conveyed another estate to the same trustees for the same purposes; for both the conveyances were voluntary, and void as against creditors; and it could not mend either that they were given at the same time to the same objects and purposes: besides which, they did not purport to be given the one in consideration of the other. They therefore objected to the reception of the evidence of a different consideration from those which were stated in the deed,

namely, natural love and affection; and the rule is, that where there is no consideration stated in the deed, the party may prove the true consideration; but where a consideration is stated, no proof can be admitted of a different one, *Bull* v. *Burnford*, Prec. in Ch. 113; *Peacock* v. *Monk*, 1 Ves. 127. That natural love and affection will not raise a consideration for a bastard, they cited Dyer 345 a. 374 a. A voluntary conveyance is always void against creditors, *Russel* v. *Hammond*, 1 Atk. 93. They also objected that it did not plainly appear that the estate at Bhowanypoor, conveyed by Naney Lack, was not the estate of Foster himself, and her conveyance merely colourable. Further, they contended that the trustees ought not to have permitted Foster to get the *Pottas* and title-deeds in his hands, which enabled him to deceive the plaintiff.

East, C. J., inclined to think that the parol evidence of consideration only of the defendant Reid's deposition ought not to be admitted; but the other Judges thought it better to receive the evidence, and it was read.

There was also an objection taken to the conveyance to the trustees, that it contained a power of revocation by the settlor, but it was upon payment to them of a certain sum by him.

On this latter ground Macnaghten, J., seemed most to rest in establishing the plaintiff's mortgage deed; but East, C. J., thought, and Buller, J., concurred, that whether or not evidence of the consideration, being different from those which were stated in the deed, could be given, yet that it did not cease to be a voluntary consideration by the father of illegitimate children to them, as against a creditor at the time, and subsequent purchaser, because the mother had also conveyed her estate for the same purpose to the same trustees. At the same time East, C. J., considered each of them to be voluntary conveyances, with respect to the separate creditors of each; and that the consideration to uphold the conveyance should enure to the benefit of the settlor.

The Court decreed accordingly in favour of the mortgagee, against the executor and trustees of the children.

No. CXXIII.

BRIG MINERVA.

13th July 1820.

N. B. THIS case has been reported *supra*, No. XCIV.

No. CXXIV.

COSSINAUT BYSACK AND ANOTHER *versus* HURROOSOONDRY DOSSEE AND CUMMOLEMONEY DOSSEE.[1]

11th August 1819.

JUDGMENT of EAST, C. J.

This cause was heard before the Court on the 5th December 1814, when the Court, amongst other things, decreed that Bissonaut Bysack (the succession to whose property was in litigation in the suit), having died without issue[2], the defendant, Hurroosoondry Dossee, as his widow, was, by the Hindú law, entitled to an interest for her life in the whole of his immoveable or real estate, and to an absolute interest in the whole of his moveable or personal estate, and directing an account of the personal estate. There were subsequent proceedings upon a re-hearing and upon a supplemental bill filed for the purpose of establishing certain testamentary papers[3], the proof of which failed altogether; and upon the account taken before the Master, the personal estate of Bissonaut Bysack was, on the 7th November 1815, reported by him to amount to Rs. 274,700, in Company's securities at six per cent., together with some other personal estate of small amount. On which an order was made on the 8th April 1816 for transferring those sums to the account of Hurroosoondry, and a final decree passed.

A bill (17th April 1817) of review has been filed (on the 9th September 1818), assigning for error in the interlocutory decree of the 5th

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[1] The decision in this case was affirmed, on appeal, by the Judicial Committee of the Privy Council, on the 24th June 1826. See Cl. R. 1834. 91.

[2] It was also a part of the decree, that Bissonaut Bysack, being at the time of his death an infant under sixteen, could not, by the Hindú law, make a will.—Note by Sir E. H. EAST.

[3] A supposed will of the father of Bissonaut Bysack.

December 1814, that Hurroosoondry, the widow of Bissonaut Bysack, is not, by the Hindú law, entitled, as declared by that decree, "to an absolute interest in the whole of his moveable or personal estate, or any part thereof, nor to any interest in the same, other than for the term of her natural life, subject to the several powers, restrictions, and qualifications, in and by the Hindú law in such case ordained and provided." Other errors are assigned in the decree of the 8th April 1816; that as Hurroosoondry Dossee is a childless widow of a Hindú, and incapable again of contracting wedlock, and the complainants are the next legal heirs and representatives of her deceased husband, Bissonaut Bysack, and, as such, entitled to the whole of his estates and property on her decease, the Company's securities and cash, standing in the books of the Accountant-General to the credit of Bissonaut Bysack, ought not to have been decreed to be transferred generally to her credit, but only in trust for her, or for her use and enjoyment, during her natural life, subject to such powers, restrictions, and qualifications, as are by the Hindú law provided. And also for that it is not ordered by either of the said decrees that Hurroosoondry Dossee should abide or reside with and under the care, protection, and guardianship of the complainants, who, as surviving brothers of Bissonaut Bysack, are alone entitled, by the Hindú law, to the care, guardianship, and protection, of his widow.

To this bill there is a general demurrer.

Upon the last ground of error the Pandits have uniformly answered that the widow was not bound to live with her husband's relatives.

The 8th question put by the Court to their Pandits was,—If a widow, from a just cause, cease to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate?

A. If a widow, from any other cause but for unchaste purposes, cease to reside in her husband's family, and take up her abode in the family of her parents, her right would not be forfeited.

Here there was a good cause at the time; viz. the extreme youth of the wife, and no pretence was made of the prohibited cause.

The great question which has been raised is, whether the widow takes the personal estate devolving on her at the death of her husband,

absolutely, as the decree has pronounced, or merely in a, and what, qualified manner. And if the decree be wrong in this respect, I am of opinion that it is also wrong in limiting the real estate to her for the express term of her life. I shall consider,

1st, What right the husband had over his real and personal estate.

2dly, What interest the widow takes in either by devolution, on his death without male issue, according to the text writers on the Hindú law, and other Hindú authorities, either Native or British.

3dly, How far the decisions which have taken place in this Court have decided the question.

1st, It seems to be clear, from the Dáya Bhága, that a Hindú may dispose of his self-acquired property, whether real or personal, as he pleases. But with respect to ancestral property the case seems different, according to the same book. Chap. ii. par. 9—14, treating of the rights of a father in ancestral land, or in a corrody, or chattels, and observing that chattels, from their association with land, must mean slaves, and not chattels generally, says that a Hindú cannot make unequal distribution of ancestral estate among his sons, as he may with regard to his own acquired wealth. Par. 20 says, that upon partition of ancestral wealth (by which is certainly to be understood real or immoveable estate, from what precedes and what follows), which can only take place by the choice of the father alone, and not of the sons, the father is entitled to a double portion, or, as it is said in par. 73, to two shares. Then follows, par. 22—"The father has ownerships in gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions, and has power to distribute them unequally, as Yájnyawalcya intimates, 'The father is master of the gems, pearls, corals, and of all other moveable property.'" But neither the father nor the grandfather is so of the whole immoveable estate.

In par. 23 it is said, "Since the grandfather is here mentioned, the text must relate to his effects. By again saying 'all,' after specifying gems, pearls, &c., it is shewn that the father has authority to make a gift, or any similar disposition of all effects, other than land, &c., but not of immoveables, a corrody, and chattels (*i.e.* slaves)," &c.

By these and several other passages which follow,—and others might be cited to the same effect,—it distinctly appears that moveable property,

or, as we should express it, personal property, (excluding slaves, which, as by the ancient law of England, are considered as realty,) though descending to the male heir from his ancestor, is held by him, at his own absolute disposal, in the same manner as self-acquired property of his own. But that over ancestral property he has only a qualified right of disposition. He is only entitled to a double share of it upon partition amongst himself and his sons.

He is not, the text cited says, master of the whole immoveable estate.

The same distinction holds in the case of a son born after a partition of ancestral property between father and sons: the afterborn son is entitled to an equal share of the land, and his brothers must make contribution from their shares; and so it is of a corrody, or of slaves. But it is otherwise as to ancestral moveable or personal property partitioned before the birth of the younger son, concerning which no contribution is directed; for, says the book (citing Srikrishna), "gems, pearls, &c. are similar to a man's own acquired wealth." Again, in treating of the participation of sons by women of various tribes, the Dáya Bhága states the law to be express, that sons of twiceborn classes have a right to the hereditary field, and the Súdra is alone excluded. So a passage of law expresses "the son begotten on a Súdra woman by any man of a twiceborn class is not entitled to a share of land; but one begotten on her, being of equal class, shall take all the property, whether land or chattels. Thus is the law settled."

The same doctrine is compendiously laid down in the Mitácshará (Benares law).

I mention these authorities for two purposes; first, to meet the argument which was urged at the bar, that the Hindú law, as set forth in the Dáya Bhága, and prevailing in Bengal, makes no distinction as to real or personal property, except in two certain cases mentioned, viz. 1st, Where the father attempts to dispose of real property in his lifetime, without the assent of his sons; and, 2dly, with regard to the peculiar property, or *Stridhana*, of the wife (or widow), of which she can only dispose of the personalty, but not of the realty; and that the mention of these two exceptions only shews that the general rule is otherwise: whereas it plainly appears from these authorities that the general dis-

tinction runs throughout the Hindú law, as recognized in the Dáya Bhága for Bengal; and that it is incumbent upon those who deny the widow's absolute right over the personalty to shew, by express authority, that she takes a different estate in it from her husband, and from all others who would succeed to him. And that for this purpose it is not sufficient to shew that the right of succession to real and personal property is in the same person or persons, by the Hindú law, for that is clearly established and universally admitted; but the right of disposition over it by the party so succeeding is a distinct thing.

The second purpose in mentioning these authorities is more immediately important to the decision of the question in judgment, whether the decree assigning to the widow the personal estate absolutely, and the real estate for her life only, can be supported without express authority, taking that distinction in respect of her succession to her husband's property; it being certain that it is an estate different from that which he held, and from that which she would transmit in the same property to the next heir or successor.

It is a different question, whether, if the father convey ancestral landed property without the assent of his sons, such conveyance will be invalid against them; or whether it be only sinful in him, and the conveyance would be good. In one place it is said (Dáy. Bh. c. ii. 23), that the prohibition of giving the whole immoveable ancestral estate forbids the gift or other alienation of the whole; because immoveables and similar possessions are means of supporting the family, "and hell is the man's portion if they suffer;" which seems to imply a religious and not a legal prohibition; and it is admitted (par. 24) that the prohibition is not against the transfer of a small part, not incompatible with the support of the family; and even the whole immoveable and other property (par. 26) may be sold, if necessary, for their support or his own. In the comment on the last paragraph, Srikrishna is cited in the margin thus: "In like manner, if there be no land or other permanent property, but only jewels or similar valuables, he is not authorized to expend the whole; for the reason holds equally. But the declaration of a power over moveables supposes the existence of both sorts of property. It should be so understood."

This seems to put the whole law of alienation, including even self-

acquired as well as personal ancestral property, upon the ground of a religious and moral prohibition, to dispose of any of it which may be necessary for the maintenance of the family; to which extent it certainly cannot be supported as a legal prohibition, so as to render the transfer invalid. And though it is stated by Vyása (Dáy. Bh. c. ii. 27), that one parcener may not, without the consent of the rest, make a sale or gift of the whole immoveable estate, nor of what is common to the family; yet in par. 28 it is said, that those texts of Vyása exhibiting a prohibition are intended to shew a moral offence, "and are not meant to invalidate the sale or other transfer;" and (par. 29) that other like texts, such as that a gift or sale of immoveables or bipeds, acquired by a man himself, should not be made by him, unless convening all his sons, must be interpreted in the same manner; and then it concludes (par. 30), "Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null, for a fact cannot be altered by a hundred texts."

This, it is true, is applied particularly to the cases of a gift or sale by a parcener of his share of that which is held in common, and of self-acquired property of both sorts: but the principle is more general; and at all events it is sufficient to make me pause before I give assent to an answer given by the Pandits in this case (in which they differed from five of their brethren), that a gift of money or other moveable property made by the widow, other than such as is allowed by law, is invalid, and may be recovered back, not only by the next heir, but by herself, and in which they differed from the Sudder Pandits, who thought the gift valid as against herself, though not against the next heir.

And though, in partition of ancestral property between a father and his sons, he is limited to take a double, or two shares, as before stated; yet in some passages (Dáy. Bh. c. ii. 46) it seems to be admitted that "he is competent to sell, give, or abandon the property." And on the other hand, though it seems admitted, in a variety of passages, that the father may do what he pleases with his self-acquired property, yet at the conclusion of Chap. ii. of the Dáya Bhága, par. 84 &c., it is laid down in the common term of prohibition, "But let not a father distinguish one son at a partition made in his lifetime, nor on any account exclude one from participation without sufficient cause;" which, unless it be

taken to be merely monitory, is in express contradiction to all that was said before.

In the case of Nemoychurn Mullick, in this Court, in 1807 or 1808, Mr. *Compton* stated that it was considered, that though a Hindú could not properly dispose of patrimonial estate without the consent of his sons, yet if he do, the disposition is valid.

But whatever restrictions may by law, or by religious or moral prohibitions, be imposed on the husband in respect to the partition, or voluntary gift, or alienation of the whole of his ancestral real property, the whole of it appears to be answerable in his hands for debts; and this, not only for debts contracted by his ancestor, but by himself; and in this respect, also, his estate must differ from the estate for life only decreed to the widow in the land, though the estate is answerable in her hands for the debts of her husband.

There are other parts of the Dáya Bhága where an act is declared to be unlawful, and yet valid; such as a partition by brothers without the consent of the mother in her lifetime.

Having shewn what estate the husband had in his real and personal ancestral estate, I proceed to the second question—What interest the widow takes in the real and personal property of her husband by devolution of law on his death without male issue, according to the text writers on the Hindú law?

If the Retnácara and the Chintámaní be authorities for the Hindú law in Bengal, they must decide the question at once; for they are plain and explicit upon the very point.

For in commenting upon the text of Cátyáyana, viz. "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property (*i. e.* as before stated, her husband's estate after his decease) until her death;" the author of the Retnácara observes, that the property of her husband (spoken of in the text) is property which has been the wife's in right of her relation to him as her husband. It is of two sorts, 1st, That which, upon his decease, became her property for want of other preferable successor; 2dly, That which, in his lifetime, became hers in right of her relation to him. In regard to the first, the law declares that she may place or dispose of effects, other than immoveables, as she pleases,

and remaining with, that is, near her venerable protector and natural guardian, and preserving unsullied the bed of her lord, she may so pass her time. Concerning the immoveable estate, the law provides, "let her enjoy it until her death, and afterwards let the heirs take it."

The comment of Vachespati Misra, author of the Chintámaní, is to the same effect: "The heritage of her husband is wealth of her husband, being either that which became the woman's property when he died, for want of another and preferable successor, or which became hers by his consent in his lifetime." Concerning the first, the law declares, "Let the woman place her husband's heritage as she pleases when he is deceased." This, however, regards effects other than immoveables; but in respect of the immoveable property the law provides, "Let her enjoy until her death with moderation;" that is, not expending too much, &c. Thus, in the case of the immoveables of her deceased husband, which have devolved on the wife, she has not power to give or alien them.

In the MS. judgment of Mr. Harington upon the case of Bhya Jha, in 1812, in the Sudder Dewanny Adawlut, which I have seen, after observing that "the Retnácara and the Chintámaní are works of the highest authority in Tirhoot," he concludes, after stating the passages: "From these passages of most undoubted authority it is evident that the widow has power to consume, or to give, or sell, in her lifetime, the moveables which may have devolved upon her by the death of the husband, but has no power over the immoveables beyond a moderate and frugal enjoyment of them. After her death, the estate, which she enjoyed frugally during her lifetime, shall pass to the heirs of her husband."

This doctrine of the Retnácara and the Chintámaní has the merit (not a little one in the Hindú law) of being clear and intelligible, and all must agree that it gives a wholesome rule with respect at least to the real property; and except in cases where the personal property is very considerable, it would give a convenient rule for practical purposes for that also. But Mr. Colebrooke, in his letter of the 27th of February 1812, addressed to Mr. Harington upon the subject of Bhya Jha's case, then in judgment, says that this doctrine, which he considered to be that of the Mithila school, "is no doubt at variance with the doctrine

of the Bengal school, which controuls the widow even in the disposal of personal property." And Mr. Harington, in the MS. judgment in the case before referred to, only states that the Retnácara and Chintámaní "are unquestionably works of the highest authority in Tirhoot;" thereby seeming to admit of a different doctrine in Bengal, as affirmed by Mr. Colebrooke: and the case then in judgment appears, by the terms, to have arisen in a part of the country subject to the Tirhoot law; and there is no case in Mr. Harington's printed Reports of decisions in the Sudder Dewanny Adawlut in which the same doctrine has been applied to Bengal.

It further appears, upon inquiry from those who are likely to be best acquainted with the decisions and practice of the Sudder Dewanny Adawlut,—and in referring to this source of information I am guided principally by the statements which I heard in Court, for my own means of information out of Court have been very limited and not satisfactory,—to be the general understanding of the persons acting in, or connected with, that Court, that the widow takes, in Bengal, the same estate, with the same power of disposition over it, in the personalty as in the realty, devolving to her by the death of her husband without sons; and that this has always been considered to be the rule in that Court.

If this be so, it is deserving of great weight; for the jurisdiction of that Court must necessarily afford frequent occasions for raising the question, if any doubt were considered as attaching to it; and yet it is most singular that several cases should occur in the printed Reports concerning the widow's right of alienation or disposition over the whole or parts of the realty, which it might be imagined was least likely to be attempted or sustained if her power of disposition over even the personalty was denied, without any distinct question raised or decision upon the latter. Thus, however, the case seems to stand in the Mofussil, resting, so far as I have been able to collect (but, as I have before stated, my own means of information have been very slender and unsatisfactory), upon opinion merely, but that opinion strong and general against the doctrine of the Mithila school as applied to Bengal upon the point now in judgment.

The same opinion was communicated by the two Pandits of that

Court, who agreed in all points with our own Pandits, except as to the invalidity of a gift of moveable or immoveable property by the widow, as against herself. The general doctrine of all these Pandits (with the exception I have mentioned) is to be found in the answer given by our Court Pandits upon the argument of this case.

They rest their doctrine upon the authority of the Dáya Bhága and Dáya Tatwa, as overruling in Bengal the authority of the Retnácara and the Chintámaní, not denying the authority of these last mentioned books when uncontradicted or uncensured by the former; but affirming that the Retnácara and the Chintámaní are contradicted and overruled by the Dáya Bhága and Dáya Tatwa upon the point in judgment; which latter books, they affirm, give only a life interest to the widow in both the real and personal estate, with the power of disposition as to both for the benefit of her husband's soul, observing moderation, but without authority to dispose of either for worldly purposes, unconnected with religious purposes, without the consent of her deceased husband's kinsmen.

The five Pandits who were opposed to the others affirm the authority of the Retnácara and Chintámaní in giving to the widow an independent authority over the moveable part of her husband's estate, though not over the fixed property other than for her life; and they deny that this doctrine is contradicted, or declared inadmissible, by the Dáya Bhága or Dáya Tatwa, in neither of which latter, they say, is the subject particularly noticed; and they contend that, by these last-mentioned authorities, the donation of the property by the widow is valid, though they admit that the donor incurs moral guilt by it.

This narrows the inquiry to this point, viz. whether the Dáya Bhága (which is admitted by all to be the ruling authority for Bengal) does invalidate the disposal of personal property by the widow at her pleasure, in which case it could not properly be decreed to her absolutely; or whether she has the absolute right of disposition over it by law, however she may incur religious or moral guilt by such disposition for worldly purposes of her own. The most material passages of the Dáya Bhága are to be found in the fourth and eleventh chapters, but principally in the last. The fourth treats of the succession to a woman's property; which, for this purpose, is divisible into property given to her

in the lifetime of her husband, and property of her husband, devolving to her upon his death. The former is considered as her own peculiar property, or *Stridhana*, which, in general, she may dispose of as she pleases, except immoveable property given her by her husband, in which she has only a life interest, and upon her death it descends to his heirs, and not to her own parental heirs; and except immoveable property given to her by her own parents in her maiden state, which always goes to her brother if she die without issue. Chap. iv. sec. iii. par. 12.

The Dáya Bhága (c. iv. s. i. 8. 9.) refers to this head of the peculiar property of a woman given to her in the lifetime of her husband: "Cátyáyana says, 'Let the woman place her husband's donation as she pleases when he is deceased,'" &c., which is construed to mean "wealth given to her by her husband she may dispose of as she pleases when he is dead, &c.," in contradistinction to the opinions before cited of the authors of the Retnácara and Chintámaní, which extend it "to property which has devolved on a widow by the death of her husband, leaving no preferable heir, as well as to property accruing to her during his lifetime, by his consent," &c.; and this contrariety of construction is expressly stated in the annotations upon the passages cited from the Dáya Bhága. This fourth chapter also asserts (s. i. 12.) the right of the widow to take "the whole estate of her husband who leaves no male issue," but reserves the full discussion of that question to the eleventh chapter.

The eleventh chapter is that on the true construction of which the judgment will principally depend.

Its title is, "On succession to the estate of one who leaves no male issue."

Sect. i. is on the widow's right of succession, par. 2: "Vrihaspati says, 'In scripture, and in the code of law, as well as in popular practice, a wife is declared by the wise to be half the body of her husband, &c.; of him whose wife is not deceased, half the body survives: how then should another take his property, while half his person is alive?'" And in chap. xi. s. 1. 26. "nor is there any proof of the position that the wife's right in her husband's property, accruing to her from her marriage, ceases on his demise. But the cessation of the widow's right of

property, if there be male issue, appears only from the law ordaining the succession of male issue." And again, in the same chapter and section, par. 54, it is said, "Let the wife of a deceased man, who left no male issue, take his share, notwithstanding kinsmen, a father, &c., be present," &c. And in par. 2, "If her husband die before her, she shares his wealth: this is a primæval law. Having taken his moveable and immoveable property, the precious and the base metals, the grains, the liquids, and the clothes, let her duly offer his monthly, half-yearly, and other funeral repasts. With presents offered to his manes, and by pious liberality, let her honour the paternal uncle of her husband, his spiritual parents, and daughter's sons, the children of his sisters, his maternal uncles, and also ancient and unprotected guests and females of the family. Those near or distant kinsmen who become her adversaries, or who injure the woman's property, let the king chastise by inflicting on them the punishment of robbery." Par. 3 of chap. xi. sec. i. goes on to say, "By these seven texts, Vrihaspati, having declared that the whole wealth of a deceased man, who had no male issue, as well the immoveable as the moveable property, the gold and other effects, shall belong to his widow, although there be brothers of the whole blood, &c.; and having directed that any of them who become her competitors for the succession, or who themselves seize the property, shall be punished as robbers; totally denies the right of the father, the brothers, and the rest, to inherit the estate, if a widow remain." The 4th paragraph, designating the order in which the heir to the estate of one who dies, leaving no male issue, places the wife at the head of the list, the daughters next, then both the parents, brothers, &c. "The sage (named before) propounds the succession of the widow in preference to all the other heirs." Par. 5 says, "So Vishnu ordains, 'the wealth of him who leaves no male issue goes to his wife; on failure of her, it devolves on daughters; if there be none, it belongs to the father,'" &c. Par. 6 declares, "By this text, relating to the order of succession, the right of the widow to succeed in the first instance is declared. It must not be alleged that the mention of the widow is intended merely for the assertion of her right to wealth sufficient for her subsistence. For it would be irrational to assume different meanings of the same term, used only once, by interpreting the word wealth as signifying

the whole estate in respect of brothers and the rest, and not the whole estate in respect of the wife. Therefore, the widow's right must be affirmed to extend to the whole estate." Par. 7 says, "Thus Vrihat Menu says, 'The widow of a childless man, keeping unsullied her husband's bed, and preserving in religious observance, shall present his funeral oblation, and obtain his entire share.'"

It is clear from all these texts that the widow of one who dies without male issue takes the entire share, or whole wealth, or estate, of her husband, both in his moveables and immoveables, without distinction; and she takes this whole share, or estate, either as the surviving half of his person, as is said in par. 2; or as his first and immediate heir, as is said in par. 4; or as appears from par. 6, by necessary construction of the law, which gives over his wealth, or whole estate, to the collateral male heirs, in default of wife or daughters, by the same words, used once only. The same paragraph expressly negatives "that the mention of the widow as the first heir is intended merely for the assertion of her right to wealth sufficient for her subsistence," for the law gives her the whole estate of her husband by the same word that it gives it to the male collaterals in her default.

The natural construction of most of these texts would lead to the conclusion, that the ultimate or absolute right of property, or the fee, as we should call it, in relation to real estate, was not in abeyance, or vested over in remainder during the widow's life; but that it is as much in her, as it was in her husband during his life, or as it would be in his next collateral male heir after her death without female issue; and from thence it would seem to be liable in her hands for the debts of her husband. And yet I believe that in bills for foreclosure, &c., it has been most usual to add the first male heir in remainder; but this may have been done in particular cases *pro majori cautelâ.*

There are some of the expressions, however, in these texts that seem to regard more the amount than the quality of the estate which the widow takes; such as the "whole wealth," "the entire share," and not merely enough for her subsistence. And it is to this distinction that the annotation on paragraph 7 relates. In that paragraph it is said that the widow should present her husband's funeral oblation, and obtain his "entire share." On which latter words it is noted, "In the

commentary on Jímúta Váhana, which bears Raghunandana's designation, another reading of the text is noticed, viz. *Critsnam art'ham*, 'the entire estate,' instead of *Crits'nam ansam*, 'the entire share.' That reading is countenanced by the Retnácara and Chintámaní; and if it be the genuine text, the whole of Jímúta Váhana's argument in the subsequent paragraphs (to s. xiii.) falls to the ground. But the Viramitródaya and Smriti-Chandrícá agree with Jímúta Váhana in the reading of this passage;" and this reading is again affirmed in par. 14. But I do not see how this observation on the difference between share and estate agrees with the indiscriminate use of the latter word in par. 3, 4, and 6, preceding, and which declare that wealth signifies the whole estate; nor is it easy to reconcile that annotation with the annotation on par. 14, asserting that the widow succeeds to the whole estate, and that so Jímúta Váhana and the rest maintain.

The Dayá Bhága next takes up the distinction between the property, that is, the right of property, and the mere use. Thus, chap. xi. sec. i. par. 9, "Nor should it be said, that the intention of the text is to authorize the taking [or using] of the goods, [not to declare the right of property;] for the taking or using one's own property is a matter of course."

If there be any meaning in the words employed, it would seem that the 6th paragraph had in terms declared, in reference to all which went before, that the widow's right must be affirmed to extend to her husband's whole estate, and not merely to wealth sufficient for her subsistence; and that par. 9 had in terms declared, in reference also to all the preceding paragraphs, that the text meant to declare the right of property in her, and not merely to authorize her taking or using of the goods.

The difficulty lies in reconciling these positions (which are maintained by a variety of illustrations, setting aside or explaining contrarient authorities) with those which follow. Having summed up the whole doctrine as before stated; it is said in the 55th paragraph—"Therefore the interpretation of the law is right as set forth by us"—the author proceeds, par. 56, "But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale, of it. Thus Cátyáyana says, 'Let the childless widow, preserving

unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it.'"

Different interpretations are given in the notes to the text, as here rendered, which is stated to be conformable with the usual reading and the interpretation of it in the Retnácara, concerning the meaning of "abiding with her venerable protector," and "enjoy with moderation." The text says, par. 57, "Abiding with her venerable protector, that is, with her father-in-law, or others of her husband's family, let her enjoy her husband's estate during her life; and not, as with her separate property, make a gift, mortgage, or sale of it at her pleasure."

This she cannot do in respect of immoveable property, though expressly given to her by her husband, c. iv. s. i. 23.

The doctrine is adopted and commented upon in Jagannátha's Digest (3 Coleb. Dig. 457—466.) But by that compiler it appears to be carried further than is warranted by the passages of the Retnácara and the Chintámaní, referred to; and in pages 464, 465, an opinion is advanced, that though a widow is prohibited from conveying away immoveable property by her own voluntary act, and for purposes of her own, yet the donation may be valid. It must have been against this doctrine that Mr. Colebrooke, in the letters referred to touching this subject, states, that "it appears, on inquiry and research, not to have been sanctioned by any previous author of note, nor, as is believed, by any writer whomsoever. It is, on the contrary, in opposition to the whole current of authorities, both in and out of Bengal." For such an observation as this could not have been applied by so learned a man to the doctrine laid down in the Retnácara and the Chintámaní in respect to the widow's absolute interest in the personal, and life estate in the real, property of her deceased husband, in those parts of the country, such as Tirhoot, where those books are received as the leading authorities, and which doctrine was expressly established by the Sudder Dewanny Adawlut in Bhya Jha's case in 1812.

Mr. Colebrooke, in combatting Jagannátha's illustration "that the gift of an estate (which shewed he was speaking of the real estate) by a widow should not be held void, while that made by a daughter, before whom she is a preferable heir, is valid," observes, that "according to

Jímúta Váhana's doctrine, which extends the restrictions to daughters and mothers, as well as to wives, the daughter is precluded from giving away an estate which comes to her from her father, and the mother one which comes to her from her sons. It has actually been adjudged by the Sudder Dewanny Adawlut in the case of a mother. But when she dies, the daughters or others who would regularly be heirs, in default of the wife, take the estate, not the kinsmen, &c."

The 58th paragraph of chap. xi. s. i. of the Dáya Bhága distinguishes between the heirs to the widow's separate property, such as her own brothers, and that property which is inherited by her from her husband, which descends to his heir after her decease; and concludes, "consequently, heritage is not ranked with woman's peculiar property." Par. 59 declares, "Therefore those persons who are exhibited in a passage above cited (sect. iv.) as the next heirs, on failure of prior claimants, shall, in like manner as they would have succeeded if the widow's right had never taken effect, equally succeed to the residue of the estate remaining after the use of it, upon the demise of the widow, in whom the succession had vested, &c."

These words are very remarkable, and, together with those which immediately precede, not only imply that the succession (the word used in every case of usual descent) to the estate vested in the wife, as heir to her husband, in default of male issue, but that she might even dispose of part at least of it for lawful purposes; for the next heir is to succeed, not to the estate generally, but to the residue of the estate remaining after the use of it.

By paragraphs 56 & 57 she was enjoined to enjoy the property or estate during her life with moderation, not to make a gift, mortgage, or sale of it at her pleasure; that is, as I understand it, a prohibition to dispose of the substance of the estate for other than lawful causes, conformably to her duty as a Hindú widow: and this prohibition is more compendiously expressed in the 60th and 61st paragraphs, "Let not women on any account make waste of their husband's wealth;" when it is said the word "waste" intends expenditure not useful to the owner of the property.

Hence, as stated in par. 62, "if she be unable to subsist otherwise, she is authorised to mortgage the property; or, if still unable, she may

sell or otherwise alien it;" and so she may for the completion of her husband's funeral rites, and for other purposes enumerated in various passages.

That the widow should have the whole property of the husband, that is, the right of property, and not merely the use of the whole, or any aliquot part of it, vested in her, and yet that she should be enjoined by law not to commit waste of it, is altogether a consistent proposition, and not unlike the estate of an incumbent in his church, his glebe, and tithes. Though the fee be in him, he can only enjoy for life, as the widow is directed to do: he cannot for any purpose dispose of or encumber beyond his own period of enjoyment, as the Hindú woman may her estate for some purposes. And if this, which is at least intelligible, be the Hindú law of Succession in respect of widows, it should seem to follow, that, upon a proper case made out, the Court would, by some means or other, restrain the commission of waste; and thus far I can understand the doctrine, if it be such, of the Dáya Bhága.

But if several of the other injunctions contained in the same book are to be construed as rules of law, restricting her use and enjoyment of the estate, apart from manifest waste of it, and not merely as religious or moral admonitions to her in such her use and enjoyment of it; then I find myself incapable of understanding or explaining the book, or of reconciling what appears to me its contradictory propositions. Thus in par. 60, after stating, "For women the heritage of their husbands is pronounced applicable to use." Par. 61 proceeds, "Even use should not be by wearing delicate apparel, and similar luxuries, &c." Again, par. 64, citing Náreda, "When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power." Again, "In the disposal of property by gift or otherwise, she is subject to the controul of her husband's family, after his decease, and in default of sons."

So far as relates to the widow's power of disposition over the husband's estate being under the controul of his kindred, as her guardians, it is consistent with the prohibition against waste by her; and it is elsewhere stated, that, except for necessary allowed purposes, she cannot give, mortgage, sell, or otherwise dispose of it, without the consent of the kindred or next heir of the husband. But when it is further

stated that they have full power, also, in the care of herself, as well as in her maintenance; and if it is to be inferred that they have also full power to regulate even her use of the heritage, in respect of forbidding her to wear delicate apparel, or to have similar luxuries, though she might command these without any waste of the estate; if these directions be not merely monitory, as I think they are, but rules of law, whereby her use and enjoyment of her husband's estate, without waste of it, are taken out of her own controul, and transferred, with her person, under the full power of her husband's kindred, to regulate as they please; then it appears to me that this latter rule is in direct contradiction to the former rules of law to which I first referred, whereby the widow's right was affirmed to extend to her husband's whole estate or wealth, and his entire share, and not merely to wealth sufficient for her subsistence; and that the text meant to declare the right of property in her, and not merely to authorise her taking or using of the goods; and when both the near and distant kinsmen are warned not to become her adversaries, or injure her property, under peril of having the punishment of robbery inflicted upon them; and it is admitted that the possession of the property cannot be taken from her. For it would be vain and illusory to declare that she has the right of property in her, and not merely authority to take or use the goods, and that that right of property extends over the whole estate, and not merely to a sufficiency for her subsistence, and that she alone has a right to possess it, when, at the same time, full power is given to another over the person, to controul her even in the use of it, and to confine her to a bare sufficiency for her subsistence, or, as par. 61 has it, "the use of property sufficient for the preservation of her person is authorized."

In order, therefore, to avoid gross inconsistencies and contradictions, and yet to reconcile these doctrines with each other, I can find no better way than to consider her as having the entire right of property vested in her, both in the moveable and immoveable estate; for there is no distinction between them taken in the books in respect of the husband's estate devolving upon her as heir, as there is in the case of male succession to ancestral property, and as there is, also, in respect of real property given to her by her husband in his lifetime, which she is declared incapable of alienating from his heirs, as she may alien the per-

sonal property so given. But that she is legally prohibited from wasting the property so vested in her, and cannot make away with it, except for certain allowable and declared purposes, without the consent of her husband's next male heir; and further, considering that, even in the use and enjoyment of the property so vested, she is religiously and morally enjoined to use moderation, and to take the advice of her husband's kindred in her manner of living, but is under no legal disability if she do not take or follow such advice; what may be considered as waste by a Hindú widow, and what may be the proper remedy for it, are different questions not necessary now to be entered into.

The third, and only remaining question, is, how far the decisions which have taken place in this Court have settled the point of law, that the widow of a Hindú, dying intestate, and without male issue, is entitled to a life estate in the realty, and to an absolute estate in the personalty of her deceased husband devolving upon her.

It is not alleged that there was any decision on the point before the *Corformah's* case, which was decreed by this Court in November 1812, the form of decrees before that having been to decree to the widow the moveable and immoveable property of her husband generally, without distinguishing between the two, or stating the quantity of the estate decreed in either: that was the first case in which the realty was decreed to the widow for life, and the personalty absolutely.

The complainants Issurchunder Corformah, and Nairanee Dossee, filed their bill for an account and partition against Govinchund Corformah and others; and in that case Ramoney, who was the widow of Soorutchund, was, upon the partition, decreed entitled to two shares, one in her own right as widow, and another as heir of her son who had died after his father; and she was decreed a life estate in the realty, and an absolute estate in the personalty, as in the present decree. This decision is stated to have been made upon great consideration, after much argument, and in conformity with the opinion of the Court Pandits; and at first sight it appears as if this Court had expressly adopted the doctrine of the Retnácara and the Chintámaní, as applicable directly to Bengal: or, admitting that the authority of those books, yielding to the Dáya Bhága in Bengal, that the Dáya Bhága did not contradict them in this respect, but was capable of, and did then receive, a con-

struction consistent with those older authorities; if the decision had appeared to me to have been so grounded, I should certainly have yielded my impression of the true construction of the Dáya Bhága, to such an authority. But the distinction which has been taken, that that was a case of partition, and not of simple succession, supported as that distinction is by the opinion of our own Pandits, which would reconcile that decree with the opinion of Mr. Colebrooke, and with the opinion of the Sudder Dewanny Pandits, upon the doctrine of the widow's succession, has induced me, after much hesitation and anxious investigation, to conclude that the Court decided the *Corformah's* case upon the ground of the law of partition, and not of simple succession. One of the two Pandits who advised the Court in that case is still in his office; and, to questions put to them upon this point, they have both answered thus :—

6th *Q.* Is there any difference in the quantity of interest which a woman takes in property by partition with sons, and that which she takes by the death of her husband without issue?

They first answered, "There is no difference in the interest so taken.' But they immediately afterwards corrected themselves, and stated thus—

A. "There are different opinions on this subject. Some Pandits affirm that property obtained by a woman sharing with her sons is to be considered as *Stridhana*, separate female property as her own, over which she has perfect uncontrolled authority. There are opinions both ways. We are of opinion that the most eligible mode would be to consider it *Stridhana*, it being more in the nature of a gift than what she succeeds to in her own right."

7th *Q.* Does this answer apply equally to moveable and immoveable property?

They first answered, "It applies equally to both moveable and immoveable property." But then they added, "Fixed property given by a husband to a wife is not alienable by her." Now if the estate which a woman receives on partition, either as a widow or as a mother, is to be considered as in the nature of *Stridhana*, it has been already shewn that she takes it absolutely, but cannot alien the real estate, though given to her by her husband in his lifetime, but that after her death it shall go to his heirs: *à fortiori*, therefore, she could not alien his real property, which simply devolved upon her at his death.

In the Dáya Bhága, c. ii. 46, it is said, speaking of partition, "the

mother shall take an equal share with her sons if her husband be deceased." And again, in c. iii. s. ii. 29, "when partition is made by brothers of the whole blood, an equal share must be given to the mother. For the text expresses, the mother should be made an equal sharer." This is afterwards explained, in case no separate property has been given to her, for then she takes only half a share. This would seem to imply that she takes her share absolutely, otherwise it would not be an equal share, nor would she be an equal sharer with her sons. But the *Çorformah's* case has decided that the estate, which both a widow and a mother takes in the property of her husband on partition, follows the rule which is expressly given by the Dáya Bhága as to *Stridhana*, namely, that she takes the personalty absolutely, but the realty only for life; and that, as it has been shewn, is more nearly conformable to the estate which the husband or son took in the ancestral property. The decision of the Sudder Dewanny Adawlut in *Bhya Jha's* case took place very recently before the decision of this Court in the *Corformah's* case; and it is not improbable that the recollection of the two decisions (by both of which the personalty was given to the widow absolutely, and the realty for life only) might be blended together, so as to leave an impression upon the minds of those who heard of them at that time that the doctrine of the Retnácara and the Chintámaní was applied generally to Bengal. But when it is now ascertained that the one decision was made in respect of lands in Tirhoot, where those books give the rule; and that the other was made in a case of partition, when the Dáya Bhága gives the same result, though by a different rule; the authority of the *Corformah's* case will stand, though it does not conclude the present; and the varient conclusions in the different cases will not be inconsistent, nor the doctrine of the two Courts contradictory.

The next case, that of *Seebchunder Bose* v. *Gooroopersaud Bose and others*, decreed finally on the 7th August 1813,[1] was also a case of partition, and is therefore capable of receiving the same answer. To the two other cases which here occurred, the one of *Sreemutty Juggomohamey Dossee, widow of Mudunmohun Gupto* v. *Ramhun Gupto*, decreed on the 23d June 1814, and the other of *Júpada Raur* v. *Juggernaut Thakoor*, decreed on the 7th Feb. 1816, the same answer cannot

[1] See Macn. Cons. H. L. 69.

be given. But those cases passed without argument at the bar, though not without notice, upon a full understanding that the point had been before expressly decided by this Court, upon the misunderstanding, as it now appears, of the *Corformah's* case, or the misblending and misrecollection of that with *Bhya Jha's* case. This impression of the law was so strange, that it was admitted in the former case, even by those who were interested against it; and the only points made against the widow were to question the valid completion of the marriage, or, if valid, that she had forfeited her estate by refusing to join herself to, or live with, her husband's family after his death; both which objections were overruled upon the opinion of the Pandits. In the last of the two cases the decree was taken as a matter of course upon the supposed conclusiveness of the former decisions.

The result, then, of the whole is this, that unless the authority of the Retnácara and the Chintámaní are to give the rule on the point in judgment in Bengal, the decree in its present form is erroneous: and it appears, by the general opinion of the Pandits of the Sudder Dewanny Adawlut, and of our own, supported by the authority of Mr. Colebrooke, and in effect by the decisions in the Sudder Dewanny Adawlut in *Bhya Jha's* case, and other cases, when the doctrine of those books has been applied to cases on the specific ground of their arising in Tirhoot, that the same doctrine does not apply to Bengal, being in opposition to the doctrine of the Dáya Bhága, which is the ruling authority in this province. And it seems that, by the Dáya Bhága, no distinction is taken between the realty and personalty as to the *quantum* of the widow's estate, but the whole appears to be given to her absolutely for some purposes, though restricted in her disposition as to others; and therefore she takes more than a life estate in the realty for those allowed purposes, and less than an absolute estate in the personal for other and different purposes; and if this be so, the decree cannot be supported in its present form. But at present it is sufficient to overrule the demurrer, without specifying the particular form in which the decree may ultimately be drawn up.[1]

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[1] The decree was, that the several decrees of the 5th December 1814, and the 8th April 1816, should be rectified; and that the said H. Dossee should be declared entitled to the real and personal estate of her husband, to be possessed, used, and enjoyed by her as a widow of a Hindú husband dying without issue, in the manner prescribed by the Hindú law.

Note by Sir E. H. East.—There was an appeal against this decree; and, soon after it was pronounced, an application was made to the Court to direct the payment over to the widow of the whole of the personal estate in the hands of the Master, together with the accumulation of interest.

This, however, was opposed on Saturday, the 14th August 1819, by *Spankie, A. G.*, and *East*, for the next male heir, Cossinaut Bysack, and by *Money* and *Lewin* for Comulmoney, and supported by *Fergusson* and *Compton*.

The Court, after ineffectual endeavours to adjust matters equitably between the parties, made an order for the payment to her of the interest accumulated, which they thought not more than adequate to her just allowance for her rank and fortune (supposing she were not also entitled of right to the actual possession of the principal also, which it was thought as well to retain during the appeal); and also gave liberty to her counsel to apply for the possession of the principal sum to a Judge in Chambers after the decree signed. But ultimately the principal sum was retained on account of the appeal, yet, *quære?* certain costs were paid out of it.

No. CXXIV *a*.

DESHEREL'S CASE.

Note by Sir E. H. East.—This and the following cases were copied by me from a copy of the MS. of Sir Robert Chambers, formerly Chief Justice of the Supreme Court, which copy was communicated to me by Mr. Fergusson of this bar.

"The following case and questions were stated by Mr. Justice Hyde and myself (Sir R. C.) for the opinion of the Pandits of the Court, and delivered immediately to Mr. C., in Court, to be translated. The cause is then adjourned to the first day of next term, when the judgment will be pronounced. 13th April 1789.

Case.

Desherel died, leaving four sons, viz. Rama, Lushman, Bhereta, and Shatrogun. Desherel had inherited from his father only a small piece

of ground, on which he built a house; and of that house and ground he gave one half to Bhereta, and he also, in his lifetime, recommended his eldest son Rama to some employment, who thereupon left the family, and now makes no claim on his father's estate.

To the other three sons, who continued to live with him, and to do business for him, but who did business also on their own accounts, he gave, at different times, considerable sums of money, to make what they could of; and, at his death, the second son, Lushman, was worth more than the third or fourth.

Since the death of Desherel, a will, written by himself, and properly attested, hath been found, by which he gives the whole of his property to his third son, Bhereta, and his fourth son, Shatrogun, only requiring them to pay Rs. 10,000 to his wife; and also appoints them to be the attornies, making no mention of Lushman, who is deaf.

It is therefore asked—

1st, Whether, by the Hindú law, such will be valid, so as to exclude Lushman from any share of his father's property?

2dly, Supposing it not to operate to his exclusion from a share of the property, yet whether it be so far valid as to give to Bhereta and Shatrogun the exclusive management of that property?

Answer of the Pandit Ramchurn Surmona to the 1st *Q.* What the father has written is valid, according to the Shastra.

To the 2d *Q.* The father not having appointed any other son to manage his own acquired property, his appointment of the third and fourth son is valid, according to the Shastra. It will have full force.

Answer of the Pandit Goverdhun Kowl Surmono.

Answer to the 1st *Q.* The father, Desherel, having excluded his second son, Lushman, from his father's estate, has given whatever property he had to his third and fourth sons. The paper expressing this is valid according to the Shastra. In this same estate these very two persons are the masters, nor can another son overset this.

Answer to the second *Q.* Although the father had not excluded his son, Lushman, from a share in the paternal estate, and had yet, by a writing, appointed Bhereta and Shatrogun to be the managers of it, that writing would be valid, according to the Shastra."

No. CXXV.

THE KING

versus

COCK.

1*st February* 1791.

"*Davis* made a motion in Court, the first, as he stated, of its kind, for a criminal information to be filed on behalf of the Crown against Valentine Cock, for a libel on, and challenge to, Mr. Cockerell, and that the Clerk of the Crown be directed to file it, as prosecuting on behalf of the Crown. He grounded his application on the power given to the Court by the 13th Geo. III. c. 63. s. 14, 15., and recognized by the Charter, p. 37, and by the Stat. 21st Geo. III. c. 70. s. 25. A rule *nisi* was granted under date of the 28th February 1791. SIR ROBERT CHAMBERS writes at length on two questions.

1st, Whether the Court had power to grant such an information, and to order it to be filed by the Clerk of the Crown. 2dly, Whether the case was proper for the exercise of the power. As to the power, he refers to the Stat. 13th Geo. III. c. 63. s. 13, 14, 15. 34. 31.; Charter, s. 32. 34. 36.; Stat. 21st Geo. III. c. 70. s. 24, 25. Whether by common law, and grantable by other Courts besides the King's Bench, 4 Inst. 349; Prynne, 249. 252. Irish Acts printed. 3d Ed. II. 10th H. VII. 9. St. Tr. 284. Peter Fenger's case. The Statutes of Virginia speak of Information, p. 271. A.D. 1705. No. 30. In the Acts of Assembly of Jamaica Information occurs, but chiefly in the nature of popular actions. Hale's Hist. of Com. Law, 53. 3d Ed. III. c. 9. 25th Ed. III. c. 4. 42d Ed. III. c 3. Ld. Hale's MS. Liber in Linc. Inn Library, Information, distinct head from Indictment. 1 Shower, 118.

On the 5th March 1791 *Davis* moved to make the rule absolute. Argument on the facts.

Ledlie and *Strettell* argued against the power of the Court to grant information.

Davis and *Burroughs* replied.

On the 28th March 1791 *Davis* (on arrangement between the parties) moved to discharge the rule, on payment of costs by the defen-

dant, which was ordered accordingly; and the defendant's letter of apology was also ordered to be filed."

No. CXXVI.
THE KING
versus
JAMES COSMO GORDON.

16*th June* 1791.

"*Burroughs* moved that Mr. Gordon's return to a writ of *habeas corpus* might be filed.

The writ set out was directed to the defendant, a lieutenant in the military service of the East-India Company, commanding him to have the body of William Duane detained in his custody, with the cause of his caption and detention, before SIR W. JONES, or any other Judge of the Supreme Court, immediately, and was tested by SIR R. CHAMBERS at Fort William on the 15th June.

Return.—I, James Cosmo Gordon, Esq., a lieutenant in the military service of the United Company of Merchants of England trading to the East Indies, do hereby most humbly certify and return to the jurisdiction of the Supreme Court of Jurisdiction at Fort William in Bengal, that William Duane, in the writ hereunto annexed mentioned, was, on the 1st day of June instant, a British subject, residing, and trafficking, and trading, in Calcutta, at Fort William aforesaid, in Bengal aforesaid, and was not then, nor at any time since, nor is now, in the service of His Majesty, King George III., or of the Honourable Company of Merchants of England trading to the East Indies, nor in any manner licenced by the said United Company, or by the Governor-General in Calcutta for the affairs of the said United Company at the Presidency of Fort William in Bengal; and was not on the said 1st day of June instant, or at any time since, or is now, in any manner legally authorized to be or remain in the East Indies. That on the said 1st day of June instant the said Governor-General in Calcutta, in Council assembled, did resolve and order that the said W. Duane, as being a British subject, and not being in any manner legally authorized or licenced to be or remain, or to traffic or trade, in the East Indies, should be forthwith seized and sent to Europe in the first of the ships of the United

Company that may proceed to England in the ensuing season, and that he should be restrained and kept in confinement under custody of the Town Major until the departure of such ships, unless he shall enter into security, himself in the sum of S. Rs. 10,000, and by two sureties (approved by the Governor-General) in the sum of S. Rs. 5000 each, and that he will be forthcoming on the day fixed for the departure of such ship's packet from Calcutta, and then surrender him to the acting Town Major, that such orders might be then given for his proceeding to England as the said Governor-General in Calcutta should judge proper: and further, that directions should be given to the acting Town Major conformable to such resolution. And I do further most humbly certify and return to the Justices of the said Supreme Court of Judicature at Fort William in Bengal, that in pursuance of such resolution of the Governor-General in Council assembled, I, the said J. C. Gordon, then and still being the acting Town Major of and for the garrison of Fort William aforesaid, was ordered by the said Governor-General in Calcutta, in Council assembled, to arrest and take the body of the said W. Duane, and him to detain and keep in my custody, to the intent and for the purpose of sending him, the said W. Duane, to England, in the first of the ships of the said United Company which shall be despatched for England from Bengal, or until the said W. Duane should enter into security, binding himself in the sum of S. Rs. 10,000, and two sureties, to be approved by the said Governor-General in Calcutta, each in the sum of S. Rs. 5000, and respectively that the said W. Duane will be forthcoming on the day fixed for the departure of the packet of such ships from Calcutta aforesaid, and then surrendering him to the acting Town Major of Calcutta aforesaid for the time being, that such orders may be given for his, the said W. Duane, proceeding to England, as the said Governor-General in Calcutta, in Council assembled, shall judge proper; and that in obedience to such order, I, the said J. C. Gordon, in the execution of my said office as acting Town Major of and for the garrison of Fort William aforesaid, did, as it was lawful for me to do, on the said first day of June instant, arrest and take the body of the said W. Duane, and him, the said W. Duane, do still detain and keep in my possession, as in the execution of my office of acting Town Major, as aforesaid, and by virtue of and in

obedience to the said order of the said Governor-General in Council to me, so aforesaid given, it is lawful for me to do. Dated the 16th day of June, in the year 1791. (Signed, J. C. Gordon, Acting Town Major. Jackson, attorney. 16th June 1791.)

And this is the cause of the caption and detention of the said W. Duane, whose body I have ready before the Justices of the said Supreme Court, on the day and at the place in the writ hereunto annexed mentioned, as by the said writ I am commanded. (Signed, J. C. Gordon, Acting Town Major.)

Which return having been read and filed,

Ledlie moved, on behalf of W. Duane, that he be discharged on account of the insufficiency of the said return, and of the cause assigned for his detention.

Ledlie, together with *Strettell* and *Shaw*, urged (what was not denied by any one), that British subjects in this country are entitled to all the benefits and privileges of the laws of England, and quoted Magna Charta, *nullus liber homo capiatur*, &c. They objected to the return; 1st, That it did not appear from it that there was any warrant under hand and seal, according to 2 Inst. 52. 2dly, That it had not a proper conclusion, 2 Inst. 12. 591: and in a late case it was determined by the Court of Common Pleas, that where a man is committed for any crime punishable by indictment there, he is to be committed till discharged by due course of law; but when it is in pursuance of special authority, the terms of the commitment must exactly pursue that authority, 2 Blac. Rep. 806. 3dly, That the warrant or order was not set forth as it ought to be, that the cause of detention might fully appear; for if, in the return, no sufficient cause appear, he might be set at liberty. 4thly, That the commitment ought to have been to the common jail, and directed to the Sheriff; 5 H. 4. c. 10. Hawk. P. C. 181, it was held that the Sheriff was the proper officer, and that the Aldermen of London should commit to him; and also, that when the commitment is in Court to a proper officer then present, there is no warrant of commitment, and therefore he cannot return a warrant *in hæc verba*, but must return the truth of the whole matter: but if a man be committed to one who is not an officer, there must be a warrant in writing; and when there is one, it must be returned, *Rex* v. *Clark*, 1 Salk. 349. And 5thly, and

lastly, it was insisted by *Shaw*, that if the seizure and detention of W. Duane were to be justified by any Statute, by any extraordinary or special power to the East-India Company, or to their government or agents, such Statute ought to have been recited in the return, or at least so clearly referred to that no doubt could remain about the authority under which the act was professed to be done.

Davies, A. G., and *Burroughs, contra*, urged that, without any violation of Magna Charta, or the hereditary rights of Englishmen, the King and Parliament have prohibited all British subjects from trading to, or residing in, the East Indies, unless by licence of the East-India Company; and have empowered the Company, and certain Governors of their settlements, and other agents of theirs, to arrest and send to England all such British subjects as should be found in India, residing there without such licence. Those who went and resided there without it, knew that they violated the law, and incurred the penalties, &c., to which they subjected themselves. As to the 1st objection, viz. that it did not appear that there was a warrant under hand and seal, they argued that none of the Statutes from which the power is derived of seizing unlicenced persons and sending them to England require it to be done by warrant; they authorized the Company and their agents, specified in one of the latter Acts, to seize, or cause to be seized, such offenders, but they do not prescribe the mode of such seizure. In answer to the 2d objection, that the warrant had not a proper conclusion, they contended that this and the former objection were grounded on principles that relate to commitments by Magistrates in the ordinary course of criminal justice, for the purpose of bringing offenders to trial; but that this arrest was no such commitment, but done under the authority of the Statutes, for the purpose of carrying the person to England: and when he should arrive there, he might, by the Statute 9th Geo. III. c. 26. s. 7., be committed by a Justice of the Peace to the next county jail, there to remain till he should give such security to appear and answer as such Statute directs: such commitment by the Justice of the Peace must undoubtedly be under hand and seal, and have a proper conclusion. To the 3d objection it was urged, that the cause of seizing and detaining Mr. Duane was fully and clearly stated in the return, and so also was the substance of the order given for that purpose, but that

it could not be necessarily set forth in the very words of the order. They cited *Bolts* v. *Purvis*, 2 Blac. R. 1022, which shewed that, to justify such arrest, it is not necessary to set forth any written order or warrant; and as to detention, the law which gives power to seize such an offender and send him home must be considered as giving, by necessary implication, the power to detain him till an opportunity occurs of sending him home. Against the 4th objection they contended, that in the 5th Geo. I., when the power was first given, there was no common jail in Calcutta to which the offenders could be committed, nor any Sheriff to whom the warrant could be directed (no Sheriff, it is believed, in India). They argued, that the Charter of the 12th Geo. I. was the first that established Courts of Justice in India, which were to proceed according to the laws of England, and was also the first that mentioned *by name* Sheriffs. The last Act that contained any regulation of the power of seizing and sending to Europe persons unlawfully resident in India was the Statute 26th Geo. III. c. 57. s. 35., which enacts that such power be enforced and put in execution, not only by the order and authority of the Governor-General in Council at Calcutta, or of the President and Council at Fort St. George and Bombay respectively, but also by any Resident at any of the British Settlements in the East Indies, or by the order and authority of the Company's Council of Supercargoes for the time being at Canton. They urged, that the same phrase was used with regard to the Supercargoes as to the Governor-General in Calcutta, and yet neither the Supercargoes nor Residents had any common jail to which they could commit, nor any Sheriff to whom they could direct an order or warrant. They stated, also, that it was certain that in Calcutta the Sheriff was not the proper officer of the Governor-General in Council, nor could the latter, as such, issue any warrant to the Sheriff. The 5th objection they met by stating that all the Statutes relating to this subject are public Acts, of which the Judges are bound to take notice, although not referred to or set out; that it was true that the Statute 5th Geo. I. c. 21. and 7th Geo. I. c. 21. seem at first to be private Acts, but they were made public Acts by the Statute 9th Geo. I. c. 26. s. 10.; and that, as well as all the subsequent Acts under this head, they were and are expressly public Acts.

The Judges being all of opinion that Mr. Duane must be remanded,

I (*i.e.* CHAMBERS, C. J.) immediately pronounced the judgment of the Court to that effect; and in so doing I chiefly confined myself to those Acts of Parliament which appear to authorize the arrest and detention in question. The Statute 5th Geo. I. c. 21. first recites and confirms the Statute 9th and 10th Will. III. c. 44., which forbids British subjects to go or trade to the East Indies unless licenced or entitled to do so; and then enacts (s. 2.), that it shall be lawful for the East-India Company to arrest and seize, or cause to be, &c., any such person at any place where he shall be found within the limits aforesaid, and to send him to England, there to answer for the offence aforesaid, according to due course of law. As it might be difficult to prove in England the fact of trading to India, to remove that difficulty the Statute 7th Geo. I. c. 21. enacts, that whoever shall unlawfully go to the East Indies shall be deemed a trader, and to have traded therein. Then follows the Statute 9th Geo. I. c. 28., which makes both those Statutes public Acts of Parliament; and also enacts, that if any subject of His Majesty, not lawfully authorized thereunto, shall go to or be found in the East Indies, he shall be deemed guilty of a high crime and misdemeanour, for which he may be prosecuted in any of the Courts at Westminster; and, being legally convicted, shall be liable to such corporal punishment or fine as the Court shall think fit. It enacts, also, that he may be seized and brought to England, where any Justice of the Peace may commit him to the next county jail, there to remain till sufficient security by natural-born subjects or denizens shall be given, to appear in the Court when such suit or prosecution shall be depending or commenced, and not to depart out of Court, or this kingdom, without leave of the said Court. Lastly, by Statute 26th Geo. III. c. 57. s. 35., the powers given by the former Acts, of seizing and sending to England persons being in the East Indies, contrary to those Acts, may be enforced and put in execution by, or by the order and authority of, either the Governor-General in Council of Bengal, or the President and Council of Fort St. George or Bombay respectively, or by any Resident at any other of the British Settlements in the East Indies for the time being, or by the order and authority of the Company's Council of Supercargoes at Cantón, &c., and by such other person or persons as shall from time to time be specially deputed and authorized for that purpose by the Court of Directors, &c., in the

name of the said Company. To explain the words, 'by the order and authority of,' as applied to the Governors-General in Council of Bengal, it may not be improper to have recourse to another Statute of the same year, 26th Geo. III. c. 16., which enacts (s. 12.), that all orders and other proceedings of the said Supreme Court shall in future be made, and expressed to be made, by the Governor-General in Council, and shall be signed by the Chief Secretary, or his deputy, by the authority of the Governor-General in Council. Such being the legal and usual mode of passing such orders, it must be supposed that the return, speaking of an order of the Governor-General in Council, means an order so passed. When a commitment is made by a Court of Justice to an officer of the Court, a minute of the order of Court is taken down by the proper officer, and remains there as an authentic memorial. But there is no warrant of Court, and therefore none is set forth, in the return to a writ of *habeas corpus*, if one should be sued out in such a case. In like manner, here, the order, it is to be presumed, was in writing, and signed by the Chief Secretary, as the Statute requires; but that original order remains, of course, with the Council, as the authentic memorial of their proceeding: and though a copy of it was probably sent to Mr. Gordon, as the law required that he should insert a copy of that paper in the return to the writ, reason does not demand it; and the case of *Bolts* v. *Purvis* is an express authority for saying that it was not necessary in the instance now before the Court.

Let W. Duane be remanded."[1]

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[1] The proceedings in this case were under the provisions of the earlier Statutes. By the 3d and 4th Will. IV. c. 85. s. 81. it is provided: "That it shall be lawful for any natural-born subjects of His Majesty to proceed by sea to any port, &c., and to reside thereat, or to proceed to and reside in or pass through any part of such of the territories as were under the Government of the said Company on the 1st January 1800, and in any part of the countries ceded by the Nabob of the Carnatic, of the province of Cuttack, and of the settlements of Singapore and Malacca. without any licence whatever; provided that all subjects of His Majesty, not natives of the said territories, shall, on their arrival in any part of such territories, from any port or place not within the said territories, make known, in writing, their names, places of destination, and objects of pursuit in India, to the Chief Officer of the Customs, or other officer authorized for that purpose, at such port or place as aforesaid." Sec. 82. enacts, "That it shall not be lawful for any subject of His Majesty, except the servants of the said Company, and others now lawfully authorized to reside in the said ter-

No. CXXVIII.

SREE COWER AND HEERA SING
versus
BOLAKY SING AND OTHERS.

17*th July* 1793.

"It was directed, or agreed, that this ejectment should be brought. The ejectment came on to trial, and the evidence for the plaintiff was heard, and then the cause was adjourned, in order to take the opinion of the Pandits.

On the 6th March 1793 the following case was put to the Pandits, in order to enable them to determine the questions subjoined.

The house, for the recovery of which the action had been brought, was the property of Omichund Baboo, who intermarried with the sister of Hungrymull, and died in Agrahan 1165 B.S., without leaving a widow, and without having ever had any issue. Omichund had an only brother, Golabchund, who died before Omichund, leaving an only child, a daughter, Bowannee Bibee, who survived Omichund, and had, at Omichund's death, an only son, Dialchund, who was then about the age of fourteen or fifteen years, and who survived both Omichund and Hungrymull after mentioned. After Omichund's death Hungrymull took possession of his property; and it is now alleged by the plaintiff that Hungrymull obtained a right to the possession and management of that property by virtue of certain papers marked *B*. The defendant alleges that Dialchund, who survived his mother Bowannee Bibee, and also his father, had a right to the property of Omichund, as his heir and next of kin. That the four papers marked *B* are all in the

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ritories, to enter the same by land, or to proceed to, or reside in any place, &c. in such parts of the said territories as are not hereinbefore in that behalf mentioned, without licence from the said Board of Commissioners, or the said Court of Directors, or the said Governor-General in Council, or a Governor or Governor in Council of any of the said Presidencies, for that purpose first obtained;" with a proviso respecting the revocation of such licences. Sec. 83. empowers the Governor-General, with the consent of the Court of Directors, to declare any other place or places whatever, within the said territories, open to all His Majesty's natural-born subjects, for them to proceed to, or reside in, or pass through without any licence whatever. By sec. 84. The Governor-General is empowered to make laws providing for the prevention or punishment of the illicit entrance into, or residence in, the said territories of persons not duly authorized.

handwriting of Omichund, and in the *Nagri* character, and were written by him at different times, in the presence of one witness, on two or three days, but all were written about a month before his death, viz. in Kartika 1165. That on the last of those days when the witness saw him in the act of writing the said papers, Omichund said to the witness these words: 'I find myself very uncertain of health, and there is no person after my death to take care of my property except Hungrymull. Hungrymull in my presence is now managing my business, and is well acquainted with my affairs. By this will which I am making, I have distributed and given to those who are therein mentioned: after giving to them whatever I have mentioned in this will, the remainder I give to Sree Gooroo Govind, to be applied for his worship; and, to manage that, I have appointed Hungrymull in my room, and have made him master of all.' That about fourteen or fifteen days before Omichund's death, he declared to one other witness his intention to go to Umbra Shore (a place of pilgrimage), and that, on being then asked by such witness, 'Who will now be our protector, as you are going away from Calcutta?' he (Omichund) answered, 'I made a *Málik námeh* to Goymull, and I have appointed Hungrymull master, or *Málik*: he will protect you.' That Hungrymull was present at this last conversation, and that Omichund pointed him out when he so expressed himself; and on Omichund being asked by the witness what was the tenor of his *Málik námeh*, or the power which he gave to Hungrymull, Omichund answered: 'I have distributed my fortune in part to those that I pleased, and the remainder I have left to Sree Gooroo Govind: it shall be applied for his worship; and the manager of it I have appointed Hungrymull: in my absence, or after my death, he will act and do as I have done: he will stand in my place.' That Omichund, in such conversation, used no other term but *Málik námeh*. That Hungrymull, for many years before Omichund's death, had managed all his affairs, and immediately on Omichund's death entered into possession of all Omichund's property, real and personal, and continued in the uninterrupted possession of it till the Bengal year 1181 or 1182, Dialchund residing all that time in Calcutta. That Dialchund dictated to a writer of Hungrymull's the letter marked *D*, and after the writer had read it to Dialchund, he, in the presence of four persons, subscribed thereto the name of his mo-

ther, Bowannee Bibee, and of himself, at which time Bowannee Bibee's affairs were managed by Dialchund; but it did not appear that she knew of the transaction. Dialchund was sixteen years old when he so signed the paper *D*. That Hungrymull died on the 6th of Jyeshta 1190 B. S., and three days before his death delivered to his private *Gumáshtah* a rough draft of a will, written in the Bengálí character, in order to make a fair copy of it. That the draft was not in Hungrymull's handwriting, but the paper *C* is a copy of that draft which was made from it by such *Gumáshtah*, according to Hungrymull's order. That Hungrymull, on the morning of his death, ordered the paper *C* to be brought and read to him, which was done faithfully; after which, in the presence of several persons, he said, 'Very well: it is the exact copy, and I shall sign it when Mr. Levett comes.' That messengers were sent by his desire to Mr. Levett's house, desiring the attendance of Mr. Levett's *Banyan*, that he might be a subscribing witness to the execution of the paper *C*. That Mr. Levett's *Sirkár* accordingly attended for that purpose; but the *Gumáshtah*, who, by order of Hungrymull, had copied the draft, and had in his possession both the draft and fair copy, being out of the way and not to be found, Hungrymull, owing to this, did not sign the paper *C*; and when it was brought to him on the evening of the same day he was unable to sign it; but on that occasion Hungrymull, in the presence of several persons, spoke to this effect: 'My hand will not assist me to write: this (meaning paper *C*) is my will. When I die, deliver this to Mr. Levett; I have already appointed him my attorney. He is to act, also, as my attorney after my death; and tell him, when Heera Sing arrives at a proper age to deliver over every thing to him as written in the will.' That Hungrymull died that night, and that the paper *C* was, according to his directions, delivered to Levett, as Hungrymull's will, the second day after his death. That five or seven days before Hungrymull's death he declared to a witness, his friend, that he would make a will to the purport and effect of the paper *C*.

The opinion of the Pandits was then required on the following questions—

1st *Q*. Whether the four slips of paper marked *B*, and said to be the will of Omichund Baboo, without declaring them to be concluded, and

without being sealed, dated, signed, or witnessed, can have any effect?

2d *Q.* Whether Hungrymull, under the said papers, had any right to the management of the property after Dialchund became of age?

3d *Q.* Whether Hungrymull, under the said papers *B*, had any right, in the lifetime of Dialchund, to make such a disposition of the management of Omichund's property, as the disposition contained in the paper *C*?

4th *Q.* Under the circumstances above stated, is the paper *C* valid or invalid, as the will of Hungrymull? and has Heera Sing, by virtue thereof, any, and what, right to the property of Omichund, or to the management thereof?

Answer of the Pandits of the Supreme Court—

To the 1st Question. The papers marked *B* (Omichund's will) will have effect according to the full tenor of them; for these papers, as stated, are valid according to the Shastra.

To 2d *Q.* Though Dialchund were the heir, and had become of age, according to the papers *B*, and what is therein written, Hungrymull had a right to the management of the property here mentioned during his life, by virtue of the four papers *B*.

To 3d *Q.* The answer to this has been already given, viz. in that given to the second question; nevertheless, we here write that Hungrymull had a right, by virtue of the papers *B*, to make such a disposition of the said property as that mentioned in the paper *C* (his will).

To 4th *Q.* According to the Shastra, Hungrymull's will (paper *C*) is valid. It can have no effect whatever in conferring on Heera Sing the management of the property bestowed by Omichund in charity. How can that which is in itself invalid convey any power to another? This is the decision of the Shastra.

A further question was now put by the Court—

Q. To whom would the management of Omichund's property go and belong, according to the operation of the paper *B*, ascertained by the Hindú Law, after the death of Hungrymull, supposing Hungrymull to have died without making any disposition of Omichund's property, or of the management thereof, and supposing Dialchund, since deceased, to have survived Hungrymull, and supposing Hungrymull to have left two sons by two different women, to neither of whom he was ever married?

A. According to the operation of the paper *B*, ascertained by the Shastra, this answer is written:—Of the estate given by Omichund to Gooroo Gobind, Gooroo Gobind alone is the proprietor. For the purpose of receiving, paying, and preserving the same, Omichund appointed the deceased Hungrymull his representative. If issue by marriage be wanting, the management will go to the children by concubines. This is our opinion.

Strettell now moved that Mr. Blaquiere's translations of the opinions given in opposition to those of the Court Pandits be now read, as parts of the grounds of this motion, especially as the quotations inserted in those opinions are sworn by R. C. to be truly extracted from the books from whence they purport to be taken.

The motion was refused; and it was further ordered that the Pandits of the Supreme Court should be directed to re-consider their opinions, and to lay before the Court the authorities upon which those opinions were grounded.

On the 31st July 1793 this ejectment was tried, and the plaintiff was nonsuited on default of his own title."

No. CXXIX.

G.

versus

K.

1794.

"*K*, a Hindú, the defendant in this case, married *G*, the lessor of the plaintiff, a Hindú woman of the same Cast, according to ceremonies used by others of that Cast, and had many sons and daughters by her. All the sons died long before the year 1193 B. S., but some of the daughters are living. In 1193, *K*, for the purpose of having male issue, married *J*, with whom he received no marriage portion, but a small present from her father of clothes, ornaments, and furniture. Before this last marriage, *G*, quarrelling with her husband on that subject, threatened to destroy herself, or quit his house and live elsewhere, if he married any other woman. In order to pacify her, *K* signed a paper, whereby he gave her, amongst other things, three dwelling-houses and a half, and a garden, without saying whether for life or for ever. One

of those houses descended to *K* from his father; and the rest were purchased by himself. Besides the houses so conveyed *K* was in possession of two other houses, consecrated to Síva, from which he received rents, and out of those rents provided things necessary for the idol.

J has had no child, but *G* has borne children to the defendant *K* since the execution of the aforesaid paper, and one child since process was commenced by her against her husband. *K* did not deliver possession, according to the writings, either of the premises in question or of the other things conveyed thereby, but *G* continued to live in one of the houses, as she had done for many years before; and she now brought this action against her husband to obtain possession of the said three houses and a half.

The following questions were put to the Pandits—

1st *Q*. Does a gift made by a husband to a wife, in such a manner, and on such an occasion, as stated above, give the wife a right to sue her husband for the property given?

2d *Q*. Is such a gift to be understood as a gift for life only, or has the wife a right to sell the houses in her life-time, or to devise them at her death?

The Pandit Goverdhun Kowl Shermaneh gave the following answers[1]—

Answer to the 1st *Q*. Whatever property a man who has married two wives has given to the first wife, by means of a paper witnessed, in order to satisfy her in all respects, such property is the property of the wife. In order to recover such property the wife may sue the husband, according to what the Shastra directs, in like manner as for a debt.

And he quoted as authorities for this opinion Yájnyawalcya, who says, as recorded in the Dáya Bhága—'That which father, mother, or husband, has given, is called, "gotten near the fire," and it is also called, "the property of females."'[2] On the same subject Cátyáyana has spoken thus—'Neither a husband, nor yet a son, nor a father, nor brothers,

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[1] Where the texts mentioned in the answers occurring in the following pages are discoverable, I have given the references to the authorities in the notes.

[2] Rightly translated in the main, but see Dáya Bhága, c. iv. s. i. 13.

have a right to appropriate *Stridhana, i.e.* the property of females; and if any one of these shall possess himself of such property by force, he must be made to return it with interest, and must be well chastised.'[1] In the Dáya Tatwa, where it treats of the property of females, such property is termed *Soudayica Stridhana.* That which is obtained from a husband or from parents, I reckon to be *Soudayica, i.e.* given for a good purpose; and when a woman obtains *Soudayica Stridhana*, it implies that she has the power of disposing of it.

Answer to the 2d *Q.* The property of females, given as stated in the second question, is theirs as long as they live. A woman has power over this kind of property to sell it; and if it be not immoveable property, she has also the power of disposing of it at her death: and whatever immoveable property so remains after her death will descend to the lawful heirs in succession, that is to say, to her children, husband, father, mother, &c.

And the following were quoted by the Pandit as authorities on this subject. Cátyáyana says: 'Whatever property the husband has given to the wife, let her keep it, in his absence, in any manner she pleases. If he be present, let her take care of it; if not, let her deliver it to some of his relations. Let the wife dispose of the property given to her by her husband in any manner she pleases when the husband dies, but while he is alive let her keep it.'[2] On this point Náreda has spoken, as quoted in the Dáya Bhága, as follows: 'Whatever the husband, of his own pleasure, has given to the wife, let the wife, when he dies, expend, or give away, as she pleases, excepting only the immoveable property.'[3] On this, also, Dévala has spoken thus: 'The property of the wife is to be divided equally, after her death, to sons and daughters. But if she be without children, let her husband take it, or else her mother, or her brother, or even her father.'[4]

To the same questions the Pandit, Ramchurn Shermaneh, answered as follows:

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[1] See Dáya Bhága, c. iv. s. i. 24.

[2] See Dáya Bhúya, c. iv. s. i. 8, 9.

[3] See Dáya Bhága, c. iv. s. i. 23.

[4] But see this passage as translated in the Dáya Bhága, c. iv. s. ii 6

Answer to the 1st *Q.* It does. On this I here write the particulars. Whatever property the man, who has married two wives, has given to the first wife, that property is *Stridhana:* neither husband, father, son, nor brother, have any power to seize such property, or to give it away in charity. If any of these persons shall possess himself of this property by force, the Magistrate shall cause him to restore it with interest, and shall chastise him on a complaint being made. The great and learned Jímútá Váhana and others have determined this according to the Shastra.

To the 2d. *Q.* As long as she lives the wife has a right to sell the *Stridhana* given to her by her husband, unless it be immoveable property, and at her death she may also devise it, if it be not what is termed immoveable property. A woman can only have the use and occupation of immoveable property; and afterwards it will descend to the heirs of *Stridhana,* or female property."

MISCELLANEOUS QUESTIONS ON POINTS OF HINDÚ LAW, WITH THE ANSWERS THERETO.

FROM THE MS. NOTES OF THE LATE SIR EDWARD HYDE EAST, BART.

[NOTE.—The following was copied from a MS. book, furnished to me by Mr. Fergusson.
EDWARD HYDE EAST.]

QUESTIONS ON THE HINDÚ LAW OF SUCCESSION.

1st. *Q.* Does the widow of a person who dies, leaving an undivided family of sons, take any, and what, share of her husband's estate?

2d *Q.* If she do take any share, is that share at her disposal, or does it descend to the sons after her decease?

3d. *Q.* If, at the time of the mother's death, no division shall have taken place, and there should exist at that time some of the sons alive, and several sons of a deceased son, who died after the father, do the sons of the deceased son take any share upon a partition, or do the surviving sons take the whole?

4th *Q.* If there be no division of the father's property till after the death of both father and mother, the mother having survived the father, and at the time of division the family consist of sons and the sons of deceased sons, how is the division to be made?

5th *Q.* A man dies, leaving a widow and sons: one son dies. Upon partition, does his mother take any, and what, share of his property?

6th *Q.* If she do, and when she dies, leaving sons, and grandsons, how is her property divided, and particularly, how is the property divided to which she succeeded upon the death of her deceased son, &c.?

7th *Q.* If a man die, leaving a widow and sons and daughters, what share do the daughters take?

8th *Q.* If a man die, leaving a widow and sons and daughters by a deceased son, what share do they take, or do they take any?

9th *Q.* If a widow die, leaving sons and daughters by a deceased son who survived the father, her husband, do the son's daughters take any share of the property which she took at her husband's death, if she be entitled to any?

10th *Q.* If the widow have succeeded to any property from a deceased son, and die, leaving sons and daughters by a deceased son, do they take any share of her property?

All these questions relate to an undivided family; and I desire that they may be repeated with respect to a divided family.

11th *Q.* No division having taken place after the death of the father and husband, I desire further that it may be answered, what is the law in the following case:—A man dies, leaving a widow, and sons and daughters by a deceased son: one son dies before division: division is then to be made: how is it to be made?

Answers to the foregoing queries, by the Pandits of the Supreme Court.

Answer to the 1st. *Q.* The widow of a person who dies, leaving an undivided family of sons, takes an equal share of her husband's estate with her sons, as by his decease she acquires similar property therein to that which they do.

The authorities which support this doctrine are to be found, as the Pandits stated, in the Dáya Bhága, in which Yájnyawalcya is quoted as follows: 'When they make a division, after the father's death, let the widow receive an equal share.'[1] A commentator on Yájnyawalcya says: 'When the sons divide the estate, after the death of the father, let the mother receive an equal share.' Dévala says: 'After the decease of

[1] See Dáya Bhága, c. iii. s. ii. 31.

her lord, let the widow be considered as entitled to an equal share with her sons.' Cátyáyana says: 'When partition takes place, after the decease of the father, the share of the mother is equal to that of a son.' It is said in the Mitácshárá: 'On the decease of the father, the mother's share is equal to a son's, on division.'[1]

Answer to the 2d *Q.* That share is at her disposal. She may expend from it for the purposes of making offerings to the Deity; presents to her spiritual teacher; to an officiating priest; in the performance of pilgrimages to places of holy worship; in virtuous purposes; in ceremonies for the benefit of her deceased husband's and his ancestors' souls; for her own support and that of her kinsmen; in the performance of daily religious rites, and charitable gifts to worthy objects; and also in acts productive of her family's welfare. The residue is, on her death, to furnish the means of performing her obsequies; and if any thing remains, after defraying the expenses attending them, it shall go to her sons.

Answer to the 3d and 4th *Q.* If, at the time of the mother's death, no division have taken place, and there exist, at that time, some of the sons alive, and some sons of a deceased brother, the sons of the deceased take the share of their father; grandsons being considered equal to sons in cases of the division of property coming from a grandfather. On the decease, therefore, of one brother, his sons receive the share which he would do if alive.

Answer to the 5th *Q.* If a man die, leaving a widow and sons, and one son die before partition, leaving neither son, widow, daughter, nor daughter's sons, the mother inherits his share, and not the surviving brothers, according to the laws of inheritance laid down by Yájnyawalcya, who places parents before brothers. Vrihaspati is also quoted in the Dáya Bhága: 'The mother must be considered as heiress of her son, who dies leaving neither wife nor male issue, or, with her consent, the brother.'[2] On the same subject Menu says: 'Of the man dying childless, the mother shall take the estate, &c.'[3]

Answer to the 6th *Q.* The residue of the estate to which the mother

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[1] Mit. c. i. s. vii. 1. c. ii. s. i. 31.

[2] Vishnú is quoted to this effect in the Dáya Bhága, c. xi. s. i. 5. s. iv. 1. s. v. 1.

[3] Menu, B. ix. v. 217.

became entitled, on the decease of her husband, and the deceased son's share, which she became heiress to in consequence of his dying childless, must go, after her decease, to her surviving sons and the sons of her deceased sons; grandsons being entitled to what their father would have succeeded to in the case of property descending from a grandfather.

Answer to the 7th *Q.* If a person die, leaving sons and daughters and a widow, the unmarried daughters are entitled to receive one-fourth of a son's share, to defray the expense of their nuptials. It is thus laid down in the Dáya Bhága: "Let him furnish a sister with one-fourth of his own share." Again: "Let the brothers assist the daughters by giving them a fourth of their own shares. If they fail in doing this, they fall deeply into sin."[1]

Answer to the 8th *Q.* If a man die, leaving a widow, and sons and daughters by a deceased son, the unmarried daughters are to receive the fourth of a son's share, to defray the expenses of their nuptials and other ceremonies of purification.

There is no authority for this doctrine. It is inferred, that, as a grandson ranks with a son, so a granddaughter ranks with a daughter, and receives what she does.

Answer to the 9th *Q.* If a widow die, leaving sons and daughters by a deceased son, who survived the father, her husband, the share (*i.e.* of a son) which she took on the decease of her husband goes to the surviving sons, who are to give a fourth from their shares to defray the nuptial and other charges of the deceased brother's daughters. Should they be married, they are to receive nothing.

Answer to the 10th *Q.* If a man die, leaving a widow, and sons and daughters by a deceased son, and one son die before division; when division takes place, the mother is entitled to a share, equal to that of a son, as her own share, and to receive, also, her deceased son's share, if he left neither wife nor children. The surviving brothers share the remainder; and the daughters of the deceased brother are to receive one-fourth of the son's shares, if unmarried, as before mentioned.

Answer to the 11th *Q.* Having considered all the questions stated, as alluding equally to divided or undivided property, we answer

[1] See Dáya Bhága, c. iii, s. ii. 36. Menu, B. ix. v. 118.

VOL. II.] [PART III.

AN

ANALYTICAL DIGEST

OF ALL

THE REPORTED CASES

DECIDED IN THE

SUPREME COURTS OF JUDICATURE IN INDIA,

IN THE

COURTS OF THE HON. EAST-INDIA COMPANY,

AND ON APPEAL FROM INDIA

BY HER MAJESTY IN COUNCIL.

TOGETHER WITH AN INTRODUCTION,

NOTES, ILLUSTRATIVE AND EXPLANATORY, AND AN APPENDIX.

BY

WILLIAM H. MORLEY,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW,

MEMBER OF THE ROYAL ASIATIC SOCIETY, AND OF THE ASIATIC SOCIETY OF PARIS.

"IF IT BE ASKED HOW THE LAW SHALL BE ASCERTAINED WHEN PARTICULAR CASES ARE NOT COMPRISED UNDER ANY OF THE GENERAL RULES, THE ANSWER IS THIS, THAT WHICH WELL-INSTRUCTED BRAHMANS PROFOUND SHALL BE HELD INCONTESTABLE LAW."

MENU, B. XII. v. 108.

IN TWO VOLUMES.

VOL. II.

CONTAINING THE APPENDIX.

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"THE DOCTRINE OF THE LAW THEN IS THIS: THAT PRECEDENTS AND RULES MUST BE FOLLOWED, UNLESS FLATLY ABSURD AND UNJUST: FOR THOUGH THEIR REASON BE NOT OBVIOUS AT FIRST VIEW, YET WE OWE SUCH A DEFERENCE TO FORMER TIMES AS NOT TO SUPPOSE THAT THEY ACTED WHOLLY WITHOUT CONSIDERATION. UPON THE WHOLE, WE MAY TAKE IT AS A GENERAL RULE, 'THAT THE DECISIONS OF THE COURTS OF JUSTICE ARE THE EVIDENCE OF WHAT IS COMMON LAW;' IN THE SAME MANNER AS, IN THE CIVIL LAW, WHAT THE EMPEROR HAD ONCE DETERMINED WAS TO SERVE FOR A GUIDE FOR THE FUTURE."

Blackstone's Commentaries, Introd. Sec. 3.

them according to the law laid down in the Dáya Bhága, Dáya Tatwa, and by Culluca Bhatta, in his comment upon them, and other authorities taken from divine codes of law, and according to the usage of Bengal.

(Signed) SRI RAMCHURN SHERMANEH.
SRI GOVERDHUN KOWL SHERMANEH.

A true translation, W. C. BLAQUIERE.

COPY OF A PAPER IN THE HANDWRITING OF THE LATE SIR W. JONES.

IN all classes, if a man die without male issue, the following is the canon of inheritance; and on failure of the first named, the next in order inherits:—The wife, the daughters, the parents, the brothers, the son of a brother, the kinsmen within the seventh degree, the more distant kinsmen, the pupil, the fellow-student.

Vishnu.—The estate of a man who leaves no male issue goes to his wife; if he leave no wife, it goes to his daughters; if no daughter, it goes to his grandsons, to his father, and then it goes to his mother.

Yájnyawalcya.—Of a perpetual student in theology, of an anchorite, and of a hermit (who are all civilly deceased), the heirs are, in order, the virtuous pupil, and the brother in study, or he who has had the same preceptor.

ON THE RIGHTS OF THE WIDOW.

Misra.—If the husband had been a co-heir, and died before partition, his brother, and the next in order, inherit his undivided share; but his wife takes all his divided property.

Jímûtá Váhana.—Whether his estate were divided or undivided, fixed or moveable, his widow inherits it. So *Raghunandana, Sri-Krishna,* and others, very properly make no distinction where the Legislature has not.

Yájnyawalcya.—Widows are declared to have a mere usufructuary interest in the estate of their deceased lords; and they must by no means aliene or waste it, except for the necessaries of life. They may,

however, give part of it to a virtuous priest, through affection for their lords, in order to perform religious rites for his soul.

Vrihaspati.—In the Véda, in the written code of law, and by the immemorial usage of men, the wife is declared by the wise to be half of her husband's body, sharing equally with him the fruit of good or bad conduct. So long as the wife lives, half his body is alive, though the other moiety may have perished; and while half of his body subsists, who else can inherit the wealth, even though his kinsmen exist, his father, mother, and brother by both parents? Yet if he die without male issue by males in the third degree, his widow shall inherit his estate.

Mr. Justice Jones, after quoting Mr. Halhed's compilation, c. ii. s. 12., read his own translation of the original text, from which the first words in that section of Mr. Halhed's book are taken. Sir W. Jones's version of them runs thus:—

"After the civil or religious death of the father, although the sons have an absolute right to his property, yet while their mother lives it is illegal for them to divide that property." Sir William observed, that the word which he has rendered illegal seems to be equivalent to *inofficiosum* in Latin, and to import something more than 'not right or decent,' which is Mr. Halhed's phrase: it means, 'inconsistent with civil and religious duty.' Sir W. Jones then read his own translation of an extract from the sacred text of Menu. It is in these words: 'After the death of both father and mother, the brothers meet, and equally divide the paternal inheritance: while the parents live they are not master of it.' 'Gloss: From this text it appears that the brothers of the whole blood must divide the father's estate after the death of both parents; that they cannot, at their own pleasure, divide it while the mother is living, but that a legal division must be made with her assent. If they are desirous of living together undivided, the eldest brother (being of ability to transact business and keep house) shall take the whole, and the other brothers shall live under him as their father.' So is the text of Menu: 'The eldest brother shall even take entire possession of the paternal estate: the other shall live under him as under a father.'"

Quære, A divided family of Hindús consists of a mother, a son, and a granddaughter by a deceased son. The mother dies. How is her property (not being *Stridhana*) to be distributed? Does the son get any, and what share? Does the granddaughter get any, and what share? The Pandits are desired to answer the question, and quote their authorities.

A. The son inherits the whole of the mother's estate (not being *Stridhana*) during the existence of a granddaughter by a deceased son. Menu, B. IX. v. 104, 'After the death of the father and mother, the brothers, being assembled, may divide among themselves the paternal and maternal estate,' &c. Menu, B. IX. v. 185, 'Not brothers, nor parents, but sons, are heirs to the deceased, &c. A son inherits the state of his mother in the same manner as that of his father.'

A true translation. W. C. BLAQUIERE."

The widow is entitled to the same share as each of the sons, unless she shall have received her *Stridhana*, in which case she will have half a share only. Whether the family be divided, or undivided, the law in this respect is the same. The moveable property is at the widow's disposal, the immoveable descends to the heirs. If the family be divided, the same. The sons of the deceased son succeed to his share, whether the family be divided or undivided. The mother has no title to the property of her deceased son in this case, except as one of the remaining heirs to her husband, among whom the estate is dividable. The deceased son is of course supposed to have left no children.

END OF SIR EDWARD HYDE EAST'S NOTES.

II.

SIR ERSKINE PERRY'S

NOTES

OF

DECIDED CASES.

NOTES OF CASES

DECIDED IN THE

RECORDER'S COURT,

AND IN THE

SUPREME COURT OF JUDICATURE,

AT BOMBAY,

BY THE

HONOURABLE SIR ERSKINE PERRY,

CHIEF JUSTICE OF THE SUPREME COURT,[1]

AND OTHER LEARNED JUDGES.

No. I.

DOE DEM. ANTONIA DE SILVEIRA

versus

SALVADOR BERNARDO TEXEIRA.

THE person last seised was a lunatic, of the name of Domingos Texeira, who died intestate, and without issue. The defendant, some years ago, had been appointed the committee of his estates, and now claimed to keep possession of them as the heir-at-law, he being the eldest grandson of the eldest uncle of the deceased lunatic, and consequently in the fifth degree of relationship to him. The lessor of the plaintiff claimed title to the lands in question as the only next of kin to the person last seised, she being the granddaughter of the deceased's maternal grandmother, whose name was also Antonia de Silveira. This Antonia de Silveira, first, by a first marriage, had issue the mother of the lunatic; and, by a second marriage with Antonio de Mauro, had issue the father of the lessor of the plaintiff. This Antonio de Mauro was also a younger brother of the grandfather of the defendant, and a younger uncle of the lunatic. The lessor of the plaintiff, therefore, was related in the fourth degree to the lunatic, tracing her kindred through

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[1] These Notes of Cases are edited from unpublished MSS. kindly communicated to me by the learned Chief Justice.

her grandmother; and also in the fifth degree, tracing her relationship through her grandfather. She had obtained letters of administration to the estate and effects of the deceased as his next of kin. The property in question descended to the lunatic from another line of ancestors, that is, from Catharina de Souza, his maternal grandfather's mother, who also, by a will dated in 1733, appointed the mother of the lunatic her sole and universal heir.

Evidence was adduced to prove that, amongst the Portuguese in the island of Bombay, the law of primogeniture had never been acted upon in the succession to landed property, but that it had been the invariable *custom* with this class of people to divide landed property amongst the descendants of the party last seised. It was also proved, that, by *custom*, the husband in marriage became entitled absolutely to a moiety of the estate of the wife. A copy of the marriage treaty, by which the island was transferred to Charles the Second by the King of Portugal; the grant of the island by Charles the Second to the Company; the agreement under which the island was delivered over by the Portuguese in India to the English; and a copy of an agreement executed between the inhabitants of the island and the Governor in Council in the year 1672; were produced and read.

The trial lasted two days, and was most ably and zealously argued by the learned counsel on both sides. Judgment for the lessor of the plaintiff was finally pronounced by the Honourable the Recorder (Sir A. Anstruther) to the following effect:—

JUDGMENT.

This is an ejectment brought by an administratrix to the estate and effects of a Christian inhabitant of Bombay, for lands now in the occupation of the defendant, who is also a relation of the intestate. They are of that class commonly called Portuguese, being the descendants of the first European colonists here. The intestate was the owner of the lands in question, which must be considered to have been freehold lands of inheritance, so far as any lands in the island can be so considered. The case on each side has gone into collateral points, which I shall first dispose of.

The lessor of the plaintiff insists that she is one of the heirs of the

deceased, according to the Portuguese laws, and more near than the defendant to the line of ancestors through whom the property came. But she is of *half* blood in that line, and therefore never could inherit, according to the English laws of descent. She is also not wholly of the line of the ancestors from whom the property came; for although it came through the mother of the deceased, who was the aunt of the half-blood of the lessor of the plaintiff, yet the property came to that aunt from her grandmother, who was not of the blood of the lessor of the plaintiff at all: and although it came to the plaintiff's aunt in the shape of a devise, yet that devise was to the granddaughter and sole heir of the devisor, who therefore took as heir, not as devisee. The defendant is heir of the deceased *ex parte paternâ*, and therefore he also cannot have any title to this property, if the title is to be made out according to the laws of inheritance to freehold lands in England.

The defendant claims *one-half* of the property according to a particular law of the Portuguese, which vests in the husband the half of the wife's property; and if the Portuguese law is to govern the ultimate rights of the parties, it is possible that this claim may prevail, at least in part. But as my view of the case leads me to think that the customs, founded originally in the Portuguese law, cannot be admitted in part, but must obtain *in toto* if at all; and as those laws seem evidently to be founded upon the civil law, and to consider the whole heritage as one mass of property to follow the law of the person of the deceased; I consider the questions under those customs as being, at all events, only available as claims upon the distribution of the estate, not as the grounds of objection against the title of the administratrix to realize the assets.

The title of both the parties being wholly defective, upon the principles of succession to an English estate of inheritance, the immediate consequence of establishing this as the principle of decision in this case would necessarily be, that the plaintiff must be nonsuited, leaving it to the Crown to assert its rights. But I do not think that this is the state of the property.

It is proved, and indeed had been agreed to as a fact in the cause, that the whole property of the descendants of the old Portuguese inhabitants of the island has in fact always descended according to the principles of

the law of Portugal, which appears to make no distinction between the succession to real and personal estate. There has never been even a doubt or question of this general rule of succession among them. All that part of the real property of this island, the title to which has been derived from Portuguese owners, is probably held under this law of succession, and the titles must be invalid if this rule of succession be not legal.

It is also agreed to as a fact, that there has been no instance of a succession of an eldest son of any *English* subject to the lands or houses of the father, situated in Bombay, to the exclusion of the younger children, although the division has, in two instances, been contested. It is notorious, and of frequent occurrence, that the executor, or administrator, sells the lands and houses of the last owner, on the mere authority of the probate or letters testamentary. Thus, lands and houses became here responsible for the simple contract debts of the deceased owners, which, by the law of England, they are not, nor could they, in the other shape, be rendered available to the creditor, unless by some deviation from the law of England. A considerable part of the houses and lands in Bombay is held under titles thus derived from the executors or administrators of the former owners.

It is also notorious that the Sheriffs, in at least two, and I believe in all the three Presidencies in India, under the authority of the Mayors' Courts, habitually sold lands and houses upon writs of *fieri facias*, before the King's Charter first appeared to render that practice legal here and at Madras. There was no such clause in the Charter of the Mayors' Courts. Thus, if the lands in Bombay are to follow the rules of freeholds of inheritance in England, almost all the titles to such property, under any grants from Portuguese, or under Sheriffs' sales, prior to 1798, and all those held under the titles of executors or administrators, are void. If such were the necessary conclusion of the law, we must support it, but certainly with great reluctance. But I do not see that I am forced to draw any such conclusion, nor that, under all circumstances, such a conclusion would be even at all warranted.

Upon referring to the treaty by which the Island of Bombay was given to King Charles the Second, in 1661, I find that the *religion* of

the Portuguese inhabitants, and their *privileges* and *rights*, are secured to them, as subjects of the King of England; but the continuance of the Portuguese *law* is not stipulated: and this is the more strong, as the Portuguese *laws* were, by the same treaty, reserved to the Portuguese Colonists at Tangier.

But although not stipulated, the exercise of the Portuguese laws, in all points of succession, and of all personal rights, as those of husband and wife, has, in fact, remained in full force; and the question is, whether this practice can have had a legal origin. From the silence of the treaty, I did not, during the first part of the trial, see any principle of law by which the Portuguese customs could have had a legal commencement here, and threw out strong observations against their validity. Before the end of the trial, it occurred to me that the practice may have had a legal commencement, and be therefore valid; and I therefore wish to be understood distinctly to retract my former observations. Upon further reflection, I am satisfied that the practice is legal, and must be supported.

By the Charter of King Charles the Second, giving over Bombay to the East-India Company, the religion, and also the property, "privileges, and advantages whatsoever," of the Portuguese inhabitants are reserved to them, as enjoyed by them at the time of the surrender of the island by the crown of Portugal; and it is provided that the Company shall have authority to make laws for the island. It is provided that those laws shall not be repugnant or contrary, but, as nearly as may be, agreeable to the laws of England. Power was also given to vest judicial authority in the Governors and other officers of the Company in Bombay.

By other letters patent, dated the 35th Ch. II., a particular Court of Judicature was erected, to be held at such places in the East Indies as the Company should fix upon, where there existed such a legislative power: and when we find that the course of all successions has been uniform and uninterrupted for one hundred and fifty years, according to some rule different from the English law, I think the Court is bound to presume a local law or regulation to warrant the commencement of such usage, if such regulation would have been valid. If no such power had been granted to the Company, I should have presumed an imme-

diate Charter or Proclamation from the Crown, directing such a regulation to be observed in the settlement.

It is not necessary to the determination of this case to settle whether the presumed regulations of the Company, or of the King, should be supposed to extend to the descendants of the Portuguese alone, or to all Christian subjects of the King here. If a regulation applicable to either, and directing the succession to such lands to go in the same channel with personals, could be valid, that will be sufficient to support the present claim; and I think that such a legal origin of the custom, both as to the Portuguese, and also as to the English inhabitants, may have existed, and therefore must now be presumed.

My observations in the course of the trial, upon the importance of the Portuguese law, were suggested by the appearance of an opinion among the Portuguese witnesses, that that is the code to which they are subject; and so far as may be necessary for removing any impression that the law of Portugal can, of its own force, operate here, I repeat, in the hearing, I hope, of many of the Portuguese subjects of this government, that they are subject to the law of England alone, the Portuguese laws not being reserved to them by the cession of the island.

But it is perfectly consistent with this general power of the English Government that a particular part of the law of the original European inhabitants of the island may have been given to them by their new rulers, after the transfer of the island from the crown of Portugal. The whole, or nearly the whole, Dutch laws are reserved at the Cape of Good Hope and at Ceylon, and the French laws in Canada; not, I believe from any right of the original colonists to be governed by those laws, but merely from the paternal care of the Crown of England in giving to the colonists, as its subjects, the laws best suited to their habits and feelings; and I see no difficulty in supposing that the Portuguese law of succession may, upon the same principles, have been given to the Portuguese inhabitants of Bombay.

In other parts of the world a difficulty might arise in discriminating the objects for whom such a presumed regulation reserves the Portuguese laws. All the inhabitants, or at least all the Christian inhabitants, of English settlements, born under the ligeance of the Crown of

England, are Englishmen. This is the general law, and, so far as general rights and privileges here are in question, all the inhabitants of Bombay have the rights of Englishmen. But in all our Acts of Parliament and Charters regarding this country, the European subjects of the King are expressly recognized as a distinct class. The parties in this cause, even if Protestant, could not sit upon juries. I can scarcely, indeed, point out any legal interpretation of the words of the King's Charters, consistent with the state of Bombay at any time, under which this distinction is made; but there is no doubt that is the meaning of the Charters creating all the Superior Courts in India. The Statutes refer to the same distinction, which was originally correct as to the other Presidencies. I think, therefore, we are warranted by the distinctions thus recognized by the legislature, in noticing the difference of the tribes or casts of Christians forming this society. And it will be unjust to notice these distinctions only in those points which exclude the Portuguese subjects here from privileges or honours, and not also to recognize it in points connected with the usages and with the established ideas of right among this class of Christians.

We are daily admitting similar distinctions, not only among the Muhammadans and Hindús of this island, who are the only classes provided for by the legislature, and each of which classes is subdivided into many tribes, the latter into almost innumerable casts; but also among the Jains, the Jews, and the Pársís. It is found, in practice, that the distinction between the Portuguese and the English inhabitants of this place is as strongly marked and as clearly preserved as between any other two casts of the inhabitants. We are bound by the treaty to secure to the Portuguese their religion. Even this would establish them as a distinct class. But the fact of the actual distinction goes much further.

I am satisfied, that so far as particular usages of the Portuguese shall be found to be sanctioned by uniform practice, they are sufficiently a distinct class to have been the objects of a regulation, which, I think, the Court ought to presume to have passed, sanctioning their original laws of succession and other similar rights. If it shall be found that the custom in other respects has been uniform, I think it will raise a presumption of a legal origin of the practice, sufficient to support the

whole established course as to the marital rights, as well as all cases of succession.

But I also think that the claim of the plaintiff would be valid under the law of succession of English subjects here. The whole existing practice of this place is inconsistent with the title to real property being the same here as in England. From the uniformity of the practice here, I have no doubt that the course of decisions, from the earliest time, has proceeded upon the principle of the succession to all property, whether real or personal, being governed by one law, the law of succession to personal estate; but it is not even confined to successions. The law of all property here is, throughout, the law of personal property, and was so long before it was apparently legalized by the Charter under which we now act as to executions. Such being the admitted fact, the only question is, whether this course of decisions could have had a legal commencement. If it could be legal, we must presume that it was so: it might commence by Charter, or by Proclamation of the King, or by regulation of the Company, under the legislative authority given by the King's Charter. From the time of Charles the Second there appears to have been a legal judicature here under the original sanction of the King's Charters, and acting, as I presume, upon some legislative provisions which the East-India Company was empowered to make from time to time. If no such legislative power had been vested in the Company, and if the power of making laws for this island had remained wholly in the Crown, I think the Court ought not to hesitate in presuming the necessary authority of the Crown to have originated and sanctioned a course now established by usage, and, as I think, highly beneficial and expedient.

The privilege of real property of not being taken in execution under a *fieri facias*, and of not being liable to simple contract debts of a deceased owner, is naturally so unjust, and so unfit for a colonial establishment, that it has been, I believe, universally rejected in the plantations. The general rule, that the law of the mother country is not to be carried into a colony, except so far as it is fit for the state of the colony, explains, and fully warrants, this part of the old practice of former Courts of Judicature here, or would give legality to any legislative provisions of the Company, supported by such manifest

grounds of expediency. The same principle will justify the deviation from the English law as to the whole character of real property in India.

When the Courts of Judicature were first called upon to decide upon the rights of succession; or when the East-India Company were first called upon to determine by regulation what law of succession, as to lands, should be followed in Bombay; the general question may be supposed to have been, whether the law of freehold property in England should, or should not, be introduced here? And the inconveniences of such a rule as to legal executions for debt, and as to the immunity of the lands of a deceased from his simple contract debts, are so obvious, that no one can be surprised at its not being adopted. In both those points, more particularly, the English law of real property is wholly contrary to the principles of mercantile law; and commerce must be considered as the basis, as it is manifestly the principal object, of all distant plantations and colonies of a mercantile people. Bombay was obtained expressly for the purpose of English commerce.

But I think that the inapplicability of the English law of real property, both as to responsibility for debt, and as to the rule of succession, may be established upon a higher ground than even the obvious advantages to a mercantile colony. It strikes me that the origin and nature of the whole law of real property in England is, in its very nature, local, and cannot be understood to follow the persons of Englishmen colonizing distant plantations.

The law of England as to succession to property of deceased persons may be divided into two branches; the one of which is attached to the land of England, the other to the persons of the inhabitants. They are perfectly independent of each other, and are founded on different principles. If an Englishman forsake his country, and permanently settle himself in France, that part of his succession which follows the law of his person, including leasehold lands in England, will follow the law of France in which he was domiciled. If he leave freehold lands of inheritance in Middlesex, they will descend to his eldest son alone; if in Kent, to all his sons; in particular other places, to the youngest son: for these are the laws attaching to different portions of the soil of England, without any reference to the person, except as being a liege subject of the King. If a Mogul or a Mahratta, a Jewish or a Pársí

inhabitant of Bombay were to purchase lands in England—as they certainly might do, and the lands would descend to the heirs of the purchasers, if the obstacle of religion were removed—the course of the inheritance must still follow the law of the particular soil. Here the Mogul and Mahratta, the Jewish and Pársí inhabitants, are protected in all their rights of succession. There is no exclusion here of infidels from inheritance, as being, according to the principle of our law at home, perpetual enemies of the King. They may, and do, succeed to lands here. If, therefore, the law of England as to inheritance of lands had been applied here, the eldest son of a Hindú, or of a Mogul, must take the whole land, giving the widow her dower. The effects of such a principle are so inconsistent with the state of India, and with the existing rights of the natives, that it is sufficient thus generally to refer to them, in order to shew that this could not be. Then the question arises, how was the objection to be got rid of?

It is supposed that it might be got over by retaining the English law in general, and by making particular exceptions out of it; and the case has been argued as if the provisions as to the successions to Hindús and Muhammadans, in the Statutes establishing the King's Courts here, were such exceptions by legislative authority out of the general rule.

But an exception to a rule must be a thing *ejusdem generis* with the objects of the rule. The customs of gavelkind and of borough-english are exceptions to the general law of descent; but still the exceptions, as well as the rule, are laws attaching to lands, and binding its succession, whatever may be the class of persons holding each particular spot to which either the general law, or any particular law, of succession attaches. But the admission of different rules as to the inheritance to the same lands, when held by different classes of persons, is not an exception out of the general law of succession which binds the particular soil, but is the substitution of a totally different principle of descent, and is not confined to the cases in which the Legislature has interfered. An exception out of a rule is, in general, held to be a confirmation of the general rule in all other cases not within the exception; and is a proof what the law would have been in the excepted cases also, if the exception had not been made.

But the supposed legislative exceptions as to the Muhammadans and

Hindús are shewn in practice, and admitted at the bar to be no more than the conclusion which the law, with the aid of reason in interpreting it, had before drawn as to these very cases which are now argued to be legislative exceptions out of some general rule; and which conclusion the law, as interpreted in this and in every Court in India, still habitually acts upon as to Jains, Jews, and Pársís, and every other Asiatic tribe; and is consonant to what custom has, in fact, also established among the Portuguese, and even amongst the English here. Thus it is manifest that the legislative provision as to Muhammadans and Hindús is not an exception out of a contrary general rule, but that it must be, as it has been very properly considered at the bar, rather a legislative recognition of the legality and correctness of the general principle in the existing course of decisions, which is, at least, equally applicable to all other Asiatic tribes. It is, in fact, carried further; and as the course of actual succession among all classes, according to the law of each nation, is universal here, the origin of this uniform practice seems to be manifest.

The only general and consistent principle which could be established here, so as to protect the usages of the natives, and also to prevent the unjust effects of the English law of real property as to debts; and which has accordingly been established in practice, from the evident reason of the thing, long before, and independently of, the Statutes establishing the King's Courts, and appearing to sanction, in part, the established custom; is, that the law of property in land here cannot, consistently with the state of this society, be permitted to follow and to depend upon the land as in England; that the property in lands here must therefore follow the law of property of the person; or, to use a more familiar expression, that it must, like leaseholds in England, become personal property, for the purpose of succession, and of liability for debt, by execution or otherwise, and in other matters of title, and must therefore be as variable as the laws of the various Casts who compose this society.

I not only think this principle not inconsistent with the law of England, but if it were *res integra*, I should be inclined to think that this is the true principle of the English law in all foreign settlements, including even colonies newly established in lands before uncultivated

and uninhabited, if the law be not otherwise fixed or defined by any legislative act of the proper authority.

The subjects of each estate, in planting new colonies, must be supposed to carry out with them the law of the mother country, so far as it applies to their situation as colonists; for human society cannot exist without some definite rule as to the rights to property: and where no other is prescribed, the former law of the people must be supposed to continue. The law which English colonists carry with them, if not otherwise fixed, and if left to this natural inference, is therefore, in its very nature, the law which follows the persons of Englishmen. But the law of descents of land belongs to, and remains with, the land of England to which it is attached. It has nothing to do with the persons, and cannot follow them. It is a fruit of feudal tenure, and was introduced for the purpose of preserving to the lord of each fief the entire service of his vassal, and the whole fruits of the vassalage. Originally all the land of England under the Saxons must have descended to all the sons; for the equal distribution of the property of deceased persons was the law of the Saxons: and if in any places the Danish law, as introduced by Canute in England, and which admitted the daughters to share, were established and retained, I consider these to have been exceptions to the general Saxon law. In the civil law, the *hæreditas* includes all the property alike, and goes among all the children. In many other codes, among the Jews, among the Hindús, among the Greeks, in the Muhammadan code, the males take either the whole, or at least a greater share of the succession. Among the northern conquerors of the Roman provinces this partition among sons seems to have been the most general rule, until the introduction of the Canon law, which was in this respect generally copied, although with some difference, from the civil law in Europe. In the 12th and 13th centuries the law of succession seems, in general, to have been only of two kinds: the first consisting of noble fiefs, the possession of which was connected with high offices of honour, or other military fiefs; and the second, applicable to all other property, whether in lands or goods. The latter, in most, if not all, the countries of Europe, were partible among all the sons of the persons dying, as indeed all property, including even noble fiefs, is stated by Wright to have originally been before the Emperor

Frederick restricted to the eldest son the succession to honorary fiefs. Wright, in his Law of Tenures, shews how the principle of the rights of primogeniture was extended to all military fiefs. The introduction of the Canon law, by the influence of the Church, establishing the rights of females equally with males in all successions, was opposed by these two existing usages, as against the usage in honorary and military fiefs the Canon law had no effect whatever: upon the succession to other property a partial success attended the intruding encroachment of the canonists. That code, almost universally throughout Europe, established its authority in all matters of property wholly unconnected with land. But in succession to even the socage or bargage lands, the rights of which were almost universally connected with, and which the feudal system supposes to be always derived from, feudal tenure, the original principle of succession among all the sons seems to have been able, very generally in all parts of Europe, except Britain, to sustain itself against the Canon law in the new form of customary laws of succession attaching to the particular lands; in which state even lands not held by honorary titles or military service, and therefore not descendible to one heir, but partible among all the sons, continued to pass by the original law of descent of all property against the inroads of the canonists. This seems to be the shape and the chance, amidst the clashing codes of jurisprudence and customs, by which the law of succession to lands has come to be habitually severed, in our notions of legal principles, from the rights of property arising from the law of the person of the last holder, which is evidently the natural, and was till then the only principle of succession. It has everywhere created a new principle of succession to land, not as the law of the people or of the persons of the nation, but as the law of each spot of the soil which the nation occupies, and which varies in different places. There seems to be no doubt, that what is now considered a mere local law of succession to particular lands, the custom of gavelkind, was originally the general and natural law by which the whole property of every Saxon descended to all his sons, although, by being now preserved only as a local exception to the general law of feudal descents, this also appears now to be a law of the particular soil to which it is locally restricted. On the Continent of Europe, in general, all lands, except noble fiefs, still

descended to all the sons: so the law of the Saxons, which now appears as only a local exception to the general law of property in England, excepting the lands held by knights' service, existed for nearly two centuries after the introduction of the feudal system, and of the principle of tenure (the distinguishing badge of that system) by William the Conqueror. In England, as on the Continent, the noble fiefs of the tenants *in capite* were connected with the offices granted with them, and the duties to be performed; of course the descent was suited to the office or other duties. Arundel Castle is still the title to an English earldom of which the descent must be single, and the possession is accordingly restricted by the Legislature. The knights under the great tenants of the Crown held their lands by similar tenure, for similar purposes, requiring personal service of one heir. Of the whole feudal system, the very foundation is the supposed and imaginary annihilation of original property of individuals in the soil, and the vesting of the whole land in the Crown, from which the titles of all tenants must be supposed to be derived, in return for duties or services to be rendered. This is shewn by Sir Martin Wright, in his Law of Tenures, to be the very principle and essence of tenure. But this was at first merely an imaginary law as to a great portion of the lands of England. Lands held in socage not being within the reason of the rule, which made all the lands descend to the eldest son, were not, at first, within its effective operation. Thus, in Kent, no lands anciently held by knights' service could be the objects of the custom of gavelkind, which Robinson shews to have extended to all socage lands in Kent, whether free or base socage.

In Kent, in a few other dispersed parts of the country, which are carefully distinguished by Robinson, the people asserted, and still retain, this vestige of the old law of property among the Saxons, which, in most parts of the country, has been wholly worn out. By degrees the practice of descent to the eldest son alone had been extended in almost every part of England, except Kent, to lands held in socage, in imitation of the rule in the more noble tenures by knights' service. This seems evidently to have been assisted by some leaning, perhaps of policy, or perhaps of dogmatical prejudice, in favour of the rigid principle of the feudal institutions existing in the Norman Courts of Judicature in England, which is the more remarkable, as it appears from

Robinson, that no such principle ever existed in Normandy itself. There the lands of the lesser vavasors, and of the burghers, are stated to have been always partible in descent among all the sons. This extension of the feudal principle of succession to almost all the lands of England has nearly obliterated the traces and the recollection of the origin of the law; and it has been adopted very generally in the colonies, as if it were the law of the English people, and not merely the law of the soil of most of the manors of England, as I consider it in reality to be, although now, from that generality of the rule, it is presumed to apply to all the lands of England not found to be governed by a different particular law.

The feudal system was the general law of Europe; and some light may be thrown upon the origin of the rights of primogeniture, and of its applicability to new colonial acquisitions, by comparing the colonial system of different European nations in this respect. In the French, the Spanish, and the Portuguese colonies, all lands except such as are elevated to the rank of noble fiefs, or to the *jus majoritatis*, are partible in succession. I have always supposed the same to be the law of the Dutch colonies, although I do not remember to have ascertained the fact, and have not succeeded in doing so here. The general succession to one heir is, I rather believe, peculiar to English colonies.

Yet in some English colonies a different principle prevailed. In some of the provinces of New England, before the American Revolution, and in Pennsylvania, the succession to lands went to all the children; and, what is much more important to us, in Bombay the practice has been universal. In Madras I believe it to have been the same, so far as I can collect from my experience there during nearly fifteen years. It had, however, before I went to Madras, been fixed by a different principle, all lands there being now held under grants for years from the Government. But this is a late regulation, introduced, about the year 1796 or 1797, for the purposes of revenue. I have the same general impression as to the practice at Calcutta, before the introduction, of the Supreme Court there, but of this I cannot speak with any confidence.

It was, at first, argued in this case, that the grant of the Island of Bombay by King Charles II. to the East-India Company, to be held as of the manor of East Greenwich, constituted this island at least a

subject of feudal tenure, and therefore of real succession and inheritance. But I before observed, and it seemed to be conceded at the bar, that the rights of the inhabitants, and of the lands in their occupation, could not, by the terms of the grants, be meant to be at all affected by the grant to the Company: it merely conveyed to the Company the rights of the Crown in the island, which may be considered as the royalties, or all the fruits of sovereignty, except ligeance, which, with 10*l.* of rent, were reserved to the Crown.

The Crown has the general power of legislating for new colonies, or other acquisitions of the people of England, and I have no doubt that the King might create feudal tenure in a new colony. The King might create manors, and might enable the lords of the new manors, in New South Wales, for instance, to admit freeholders to hold in socage, either immediately under the King, or even under the lords of the manors, notwithstanding the Statute of *quia emptores terrarum.* But without such express provision, every person who holds lands by the title derived under this Government is a sharer in the grant from the Crown. If the King had made such provision, this would have been the exercise of the power of legislation over the land, not over the persons, and would render the land the subject of tenure. But as the whole principle of tenure of land is a mere creature of the feudal system, as applicable to the particular soil in which that law is established, I do not think that the lands of a new colony can be the subject of tenure at all, unless it were divided into manors, or honours, or other feudal divisions, as the land may be divided, for ecclesiastical purposes, into parishes, if the Crown thought proper so to do, and the right of the rector of such parish to his part of the produce would be a necessary consequence of that arrangement: but unless such direct act of legislation appeared, or unless it could be presumed from the uniform practice of the place, I do not see any reason for thinking that the principle of the feudal, or of the ecclesiastical polity, or of tenure, or of titles, as derived from either of those principles, are at all a necessary part of the law of England, when the persons are removed from the soil to which the laws of tenure and of titles apply. Here the existing practice not only does not warrant the presumption of any such legislative enactment of feudal principles, but is wholly inconsistent with it, and negatives its existence.

I have stated what I incline to think the law ought to have been here, if this had even been a new plantation and colony of Englishmen. But it was, on the contrary, a place inhabited by Muhammadans and Hindús before the Portuguese came here. When Bombay became English, we found it inhabited by those three principal tribes, and the facts shew that, by some means or other, the right of succession to lands in the island had not been attached to the land, as in England, but had been regulated by the law of the person of each owner, depending, therefore, upon his national character. It has, indeed, been stated, that Bombay was divided, under the Portuguese, into some divisions resembling manors, and the designation of a manor has been applied to the district of Mazagon. It may be so, although it has not been proved. But if this were the case, we must take the law of the several manors as continuing to go with them: and thus the only practical consequence of this view of the subject upon the present case would be, that the land of Bombay would be found to be subject to the law of descent which actually prevails, but upon a different principle of decision.

I see no reason to overturn the course of succession which has obtained here: we can only do so by supposing the King of England to have at once annihilated all the preceding rights of the whole native landholders of Bombay, and of every English settlement in India. We must suppose, that, either by the mere fact of English conquest or acquisition, or by the subsequent act of establishing Courts of Judicature upon the principles of the English law, all former titles to land were at an end; that the land of British India immediately, *ipso facto*, became the property of the King; and that all rights now existing in any lands in British India are emanations from this universal property of the Sovereign. I should have supposed such a proposition to have been, in the very statement of it, sufficient to carry its own refutation, if we had not unfortunately seen the attempt to put into actual practice, in a great part of British India, this monstrous production of the feudal system, or, rather, of theoretical and imaginary feudal principles of the schools, not only the actual feudal system, but worse than any feudal system ever existing in practice in any considerable part of Europe. We must not, in our zeal for the principles of the English law, forget that land may in nature be a subject of property in individuals, independently of any imaginary grant from the Crown. This seems to me to be the state of

landed property in India: that not being a subject of tenure at all, it ought not to follow the law of descent of the subjects of tenure: accordingly it has, not only in succession, but in every point, in this settlement followed the general law of the property of the person. The descent of the lands of Hindús, and Musulmáns, and other natives, according to the respective laws of their Casts, appears to me to be so fundamentally inconsistent with the principle of the law of descent being attached to the soil, as all subjects of tenure are, that I consider the whole current of decision of all the English Courts in India (before the legislative recognition of this part of the rule, and the principle of all the subsequent decisions up to this hour, in all cases of descent among Asiatics, not being Hindús or Muhammadans, and therefore not being within the legislative provisions), as amounting to a consistent and connected course of judicial determination, by all the competent Courts, that the law of descents of land in India does not follow the land as in England, but does follow the person, or, in other words, that such property in India is personal estate. The actual course of the descents to Portuguese and to English subjects in Bombay is consistent with, and therefore confirms, this principle. This is also consistent with the law of executions, which is also now recognized and confirmed by the Legislature, but which appears to have existed undisputedly from our first establishment in India. I therefore think that this is the general law of the property of the European inhabitants of Bombay as well as of all other.

I should have felt little difficulty in this case, if the course of decisions of the Supreme Court at Calcutta, from the period of its establishment, had not proceeded upon a different view of the law from that which I have now taken. But the whole tenour of the early decisions of that tribunal had one character. The subsequent interference of the Legislature, by the Statute of 1781, warrants me in saying, that the Supreme Court at first applied to Bengal the rules of the law of England with too little regard to the circumstances of the place. There are points in which the Courts of Judicature have no discretion. The Statute Law in general leaves no discretion in the Courts; and more particularly, where the Legislature has exactly defined the law which is to bind the distant dependencies, the provincial Courts of Judicature have only to apply and enforce the law. But the Common Law is in every point the result of judicial experience of

public expediency; and it is a fundamental principle of the Common Law, that the application of every rule is limited by the principles which introduce it, and is to be adapted to every variety of circumstances which may arise. The generul rule as to the application of the law of England to distant establishments particularly recognizes this discretionary power vested in the Judicature, to apply the law of the mother country only so far as suits the state of the colony. The present Court of Calcutta must now find the English law of real property existing there in its full vigour, as to the Europeans, confirmed by uniform decisions during above forty years. It is to be presumed that the Court now supports the existing practice there, as I think this Court must, upon the same principles, support the opposite course, as being the rule established here by usage.

But if there were any doubt as to this extension of the law to English subjects, I have stated my reasons for thinking that the Portuguese are capable of being the objects of distinct regulations in India; and as the practice as to them has been uniform, and may have had a legal commencement, I think such legal commencement of the existing course of descents, at least as among them, must be presumed, if such presumption be necessary to support it. In habitually administering, to many different Casts of people around us, different principles of law as to successions to property, a Court in India learns strongly to feel the practical truth of the maxim, that it is of comparatively little importance what the law of property is, provided it be certain and fixed.

If in this case the defendant have any right to a part of the succession of the deceased, he will claim, as in other cases, either his general distribution share, or his specific interest in the peculiar property which he may suppose to be liable to his claim. But his claim must be under the title of the plaintiff as administratrix.

Soon after the Recorder had delivered his opinion, Mr. Woodhouse, the counsel for the lessor of the plaintiff, observed, that, from the great importance of the decision to the inhabitants of Bombay, it would be highly desirable to the Bar to be favoured with the notice of the judgment which had been delivered.

The Recorder said that he would correct his note, and give it to Mr. Woodhouse for the use of the Bar.

No. II.

AMERCHUND BURDEECHUND

versus

THE UNITED EAST-INDIA COMPANY, THE HON. MOUNTSTUART ELPHINSTONE, AND CAPTAIN HENRY DUNDAS ROBERTSON.[1]

28th November 1826.

JUDGMENT of the Chief Justice SIR EDWARD WEST.

This is an action of trover for a very large quantity of gold mohurs and gold venetians.

The plaintiff sues as executor of one Naroba Outia, a Brahman, who, as it clearly appears from the evidence on both sides, though the fact was at first disputed by the defendants, was a person of high rank and consequence in the Mahratta Empire. The defendants are the United East-India Company, the Honourable Mountstuart Elphinstone, now Governor of Bombay, and Captain Henry Dundas Robertson, of the Company's military service.

It appears, in evidence, that in November 1817, soon after the commencement of the late Mahratta war, Poonah, the capital of the *Péshwá's* dominions, was taken possession of by the British forces under General Smith; and in December of the same year Mr. Elphinstone was appointed sole Commissioner of the territory, "conquered from the *Péshwá*," including, of course, Poonah. In the February following, Mr. Elphinstone appointed Captain Robertson, then a lieutenant in the Honourable Company's army, Provincial Collector and Magistrate of the city of Poonah and of the adjacent country, and also to the exclusive command of the guards in the city; and it appears that Captain Robertson had, by the appointment of Mr. Elphinstone, in addition to these functions, the political department and the judicial, both civil and criminal; all which powers he retained till lately, with the exception of the command

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[1] SIR E. WEST's judgment here given was reversed on appeal to the Privy Council, 1 Knapp, 316, on the ground that the seizure was a hostile seizure, as having been made, if not *flagrante*, yet *nondum cessante bello*, and that therefore the Municipal Courts had no jurisdiction. I print SIR E. WEST's judgment, as it involves other points, and is referred to in the following case.

of the guards, which, in September of the same year (1818), was given to Major Fearon, who, as he states, was placed under the civil magistrate, Captain Robertson.

Mr. Elphinstone, in his letter to Captain Robertson appointing him to these offices, transmitted a copy of a proclamation, addressed by him a few days before, "to the inhabitants of the *Péshwá's* former dominions," and requested him to pay scrupulous attention to all the promises contained in it. One of these promises is in the following sentence: "The rest of the country" (except what was to be assigned to the Rájá of Sattára) "will be held by the Honourable Company. The revenue will be collected for the Government, *but all property, real or personal, will be secured:*" and another of the promises, "that officers shall be forthwith appointed to administer justice."

On the 17th day of July of the same year (1818), Captain Robertson, being in Poonah, ordered his peons to bring Naroba to him at the Juna Wara, an old house which formerly belonged to the *Péshwá.* They found Naroba in his house sitting with his wife and children, and brought him away to the Juna Wara, where Captain Robertson took Naroba by himself into an inner room, and shut the door. After remaining there for about an hour, Captain Robertson called out, "Sepoys, come and take Naroba to prison;" upon which the peons entered the room, and, Captain Robertson repeating the order, they took and delivered him to the military guard at the door of the Juna Wara, and he was placed in the common jail. Captain Robertson then ordered his peons to search Naroba's house, which they did, and, on breaking open the lock of an inner room, found twenty-eight bags of gold mohurs and venetians. Captain Robertson being informed of this sent a military guard, under a Mr. Houston, for the money, which they brought and delivered to him. After this, Naroba's *Gumáshtah* (or head clerk) was also brought to Captain Robertson, who took him into an inner room, and after talking with him there a short time, despatched him also to the jail, and placed him there, but in a different room from Naroba. Captain Robertson also ordered his peons to bring Naroba's papers from his house, which they did.

A short time after this, Major Fearon, the prize agent to General Smith's division of the army, hearing, by report, that money had been

taken from Naroba's house, called upon Captain Robertson about it, who said he had his doubts whether it was prize or not prize, and refused to deliver it up. And it appears, from the evidence of Mr. Lumsden, that Captain Robertson, either at this conversation or at one shortly afterwards, said he expected twenty thousand pounds upon all the money of the *Péshwá* which he had collected. A reference was then made to Mr. Elphinstone, who directed "that the money should remain with Captain Robertson, on account of Government, until the commands of the Governor-General should be received." The proceeds of this money, which was sold by Captain Robertson for silver rupees, were afterwards paid over by him to the civil and military paymasters of the Honourable Company.

I will now revert to the evidence respecting the treatment of Naroba and his *Gumáshtah*, which, though at first sight it appeared irrelevant in an action of trover for property, became, as the object of their imprisonment was developed by the evidence, a most important feature in the case.

In the course of the same evening that Naroba was taken to jail, one of Lieutenant Robertson's peons went there and saw Naroba, who refused to take food, which being communicated to Lieutenant Robertson, he observed: "There is a Brahman cook for him: if he will not take his dinner I cannot help it."

The first witness, whose evidence has been in every particular confirmed by the witnesses for the defendants, states, that five or six days after the imprisonment of Naroba, Captain Robertson desired him to order the *Jamadár* to bring Naroba up stairs to him in the Juna Wara, and that accordingly Naroba was brought up in the charge of a sentry; that Naroba and Captain Robertson went by themselves into an inner room, whilst the sentry stood outside, near the door of it; that he heard Naroba say he did not owe any thing to any one, and Captain Robertson say, "It is the *Péshwá's* money;" to which Naroba replied, "It is not the *Péshwá's* money, it is mine;" that Naroba was speaking a little louder than usual, and Captain Robertson spoke angrily. They remained in the room about two native hours (that is, about one English hour), and then the sentry took Naroba away, Captain Robertson saying to the sentry, "Take him to prison;" that he sometimes saw Captain Robertson and Naroba together, and some-

times Captain Robertson and the *Gumáshtah.* Every other day, or every third or fourth day, the *Gumáshtah* was called by Captain Robertson, and they had some conversation, and this was continued for twenty days or a month. Naroba was also brought up by a sentry, and was kept one or two native hours, and then sent back again. The witness some days heard Captain Robertson say to the *Gumáshtah,* "This belongs to the *Péshwá;* why do you say it does not belong to him?" The *Gumáshtah* replied, "This belongs to Naroba; I do not know whether it belongs to the *Péshwá* or not." One day Captain Robertson was angry with the *Gumáshtah,* and said, "Put irons on the *Gumáshtah's* feet." Then the witness went and brought a blacksmith, who put irons on his feet: they were put on below stairs by Captain Robertson's order. The *Gumáshtah* was kept in irons about two months and a-half or three months. Whilst the irons were on his feet he used to come to Captain Robertson, and sometimes Naroba used to come at different times. The *Gumáshtah* used to come to Captain Robertson with the irons on his feet, and a sentry with him. Naroba was never present at any of the conversations which Captain Robertson had with the *Gumáshtah:* the *Gumáshtah* was never present at any of the conversations between Captain Robertson and Naroba. He heard Captain Robertson saying to Naroba, "If you will complete the cash account of the venetians, I will release you." A few days after that Naroba was released. He was imprisoned four months, or a week less than four months. The next day after he was released five bags of venetians were sent by Naroba to Captain Robertson.

The *Gumáshtah* himself is called, and says he was sent to prison; that afterwards Captain Robertson asked him whose money it was that was found at the Juna Wara; to which he replied that it belonged to Naroba. Then Captain Robertson said, "Naroba says it is the *Sirkár's* (state's) money." He still denied it; and Captain Robertson then said, "Tell the truth, otherwise I shall put you in irons, and send you to a fort." Irons were then put on his legs; "and my legs," says he, "still give me pain." A blacksmith put them on. The irons were put on immediately after the conversation with Captain Robertson. He heard him say, "Put irons on." The irons were on him for two months. His imprisonment was a close one. His friends and relations were not allowed to see him.

Upon the cross examination of this witness a paper is put into his hands by the defendant's counsel, which he says is in his hand-writing; that he wrote it in prison, in the presence of Captain Robertson and two other persons, one of whom was in Captain Robertson's service; that he wrote it on the dictation of one of those persons because he was in prison.

The Court of course rejected this paper (which could be evidence merely to contradict the witness), upon the ground of its having been obtained by duress, but the very tender of such evidence shews the object of the imprisonment.

To return to Naroba. It appears that some time during his imprisonment he was removed from the common jail, and imprisoned up stairs in the Juna Wara.

A witness for the defendants, of the name of Mullar Jairam, says, that at the time of Naroba's confinement he was, and still is, jailer under Captain Robertson; that Naroba was in his custody; that at first he was confined below stairs, and afterwards he was kept in a bungalow up stairs; that he was one day below stairs. According, however, to the evidence of the first witness, whenever Naroba was brought to Captain Robertson, in the Juna Wara—which, it appears, he frequently was during the first part of his imprisonment—he was brought from below stairs, that is, from the common jail; and the third witness, Gopall Rowjee Shevack, also says that Naroba was imprisoned down stairs a fortnight, or a month: he is sure it was more than a fortnight.

Neither of these witnesses is cross-examined as to this point, and they are confirmed by Mr. Houston, a person in the employ of Captain Robertson, and a witness for the defendants, who says that he was in the habit of going up stairs where Naroba was confined, and that he used to see him there; but that it was several days after he brought the money away, that he saw Naroba there: it might have been a fortnight after.

In addition to this contradiction of the jailer, Mullar Jairam, he is contradicted in many other particulars, even by the defendant's own witnesses, and his evidence is so inconsistent and contradictory of itself, that I think no reliance can be placed upon his testimony.

Naroba had been in jail a little more than three months when he was visited there by one Bhasker Ram Gocla, who is called as a witness

by the defendants, to prove a conversation which he said he had with Naroba upon the subject of this money. The character of this witness, and the object of his visit to Naroba, though he says he was sent for by Naroba, may be collected from the following passage of his evidence:—"I received some money, twelve thousand rupees, from Captain Robertson, for assisting in the recovery of money which was alleged to be due from some people to the *Péshwá*. He paid me in general not for particular business, and he paid me by Mr. Elphinstone's order." There can be no doubt that this man was employed to obtain admissions from Naroba; and the admissions so obtained, or pretended to be obtained, have actually been tendered on behalf of the defendants on this trial. The Court of course rejected such evidence, as obtained by duress, as there is not a shadow of pretence for saying that the imprisonment was legal.

About a week after this, Captain Robertson promises Naroba to release him, if he will make up the account of the venetians, and Naroba agrees to bring him five bags of venetians. In a few days after which he is released, on his brother-in-law's security, which is as follows:

"I, Purushram Khunderao Rahatekur, inhabitant of Poonah, do write and give this to the Honourable Company's Government, purporting to wit: That as my dear Narro Govind Autey was kept in confinement by the Government, I have become security for his personal appearance, and have got his liberty to be effected. I therefore bind myself to make him appear personally whensoever I may be required so to do. Should I not make him appear personally, then I myself shall be answerable for whatever there may be against him. Dated the 7th November 1818."

This security was of course taken for the purpose of enforcing Naroba's promise to bring the five bags of venetians, a promise obtained from him while in jail; and the next day Naroba accordingly sends to Captain Robertson the five bags of venetians.

About five days after Naroba's release, namely, on the 12th of the same month, the following bond is taken from Naroba:—

"I, Narro Govind Autey, do write and give this engagement (literally, bond, *muchalkah*) to the Honourable Company's Government, declaring that whatever *Íwáz* (i.e. *property* or *money*) of State there was

with me, such I have given over into the possession of your honours (*sáhib*). Except this I had not any more *Íwáz*, (ornaments, jewels, cloths, &c.,) belonging to the State. Should it be proved that there is any thing of these with me, then I shall be considered as a defaulter to your honours (*sáhib*). Moreover, I do not know what debt (*taslímát*) and deposit there is with the people belonging to the State (*Sirkár*). Should it be proved that I do know any thing of it, then I submit myself (to be answerable) to whatever your honours (*sáhib*) may be pleased to order (to be done to) me."

This bond is put in evidence by the defendants themselves, in order to prove Naroba's admission that the money was the *Péshwá's*, but it proves only the subjection to which Naroba had been reduced by the severity of his treatment. Naroba by this bond actually submits himself "to whatever their honours may please to order to be done to him."

In about a year after Naroba's release, interrogatories were put to him by Mr. Chaplen, who had succeeded Mr. Elphinstone as Commissioner of the Deccan; and these interrogatories, which appear to have been continued day after day for more than a month, together with Naroba's answers to them, are produced in evidence by the defendants. Under what authority, or by whose order, or at whose instance, these interrogatories were put nowhere appears. It was said, indeed, by the counsel for the defendants, that this examination was taken in consequence of the Bombay Government having referred a petition of Naroba's respecting this money to Mr. Chaplen, and having desired him to report upon it to the Government; but there is no evidence of this, any more than of the assertion of the counsel for the plaintiff, that Mr. Chaplen did, in consequence of such reference, report that seven lacs of the money belonged to Naroba. It has also been said, by the counsel for the defendants, that the decision of Mr. Chaplen upon this examination was the judgment of a competent Court, and that we had no power to question it. If so, why was not the judgment itself produced? or if Mr. Chaplen were merely an arbitrator chosen by consent of both parties, why was not his award produced?

The first sheet of this examination is an account in the handwriting, as one of the defendant's witnesses states, of one of Naroba's *Kárkuns*, or clerks; but how, when, or where, by whose order, or from what

documents it was framed, nowhere appears; and it is with reference to this account that many of Mr. Chaplen's questions are put.

In this examination Naroba says repeatedly that he cannot answer questions, or reconcile apparent inconsistencies, on account of his papers having been taken from him by Colonel Prother and Captain Robertson; and yet he is examined as to immense sums of money, and to most intricate accounts of many years past. It would have been most unreasonable to have required of him to give immediate answers to such questions, even if he had all his accounts to refer to: how much more so when his accounts, as appears clearly from all the evidence, had been taken from him?

When asked to reconcile an inconsistency between two accounts, he says, "When I was put in confinement in the Juna Wara, and used to be brought out to be examined, then the two persons, viz. Hureshur and Dorabjee, who were standing below down stairs, advised me that the European gentlemen would be angry, and that I had better say the Surat gold mohurs belonged to the State. Upon such instructions I wrote and delivered the same, consequently there appears the difference."

It is necessary to observe, that one of these two persons who gave Naroba, in jail, this advice to avoid the anger of the European gentlemen, was the same who dictated to the *Gumáshtah*, when in jail, the paper which was offered in evidence by the defendants, but which was of course rejected on the ground of duress.

As far as I can understand this examination (which, however, it is very difficult, or rather, I should say, impossible entirely to do, from the state in which it is laid before the Court, particularly as many of both the questions and answers refer to accounts which are either not produced or not identified) it does not impugn the plaintiff's claim.

But it is unnecessary to refer to it more particularly, when we consider the observations already made upon it, and the circumstances under which it was taken.

Naroba, during this examination, was under the security or bail bond, which, however illegal, might be enforced by the same power by which it had been taken. He was under his own bond, by which he "submitted himself to whatever their honours might be pleased to order

to be done to him;" and he was at Poonah, within the grasp of the same power under which he had suffered so illegally before.

It is impossible, under these circumstances, to consider Naroba as a free agent, or any admissions which he might have made as voluntary admissions.

We now come to another head of evidence on the part of the defendants, that of the money in question having been brought from Rhygur.

Regardless of truth as the natives who appear in this Court frequently are, I certainly have never, in the course of my experience here, known witnesses who, from their demeanour and the tenor of their evidence, have been so little entitled to credit as those who were brought on the part of the defendants to prove this part of their case.

If, however, the facts which are attempted to be proved by these witnesses had been better established, I cannot see how their evidence would affect the case. Suppose the money were brought from Rhygur; unless it were brought thence in breach of the capitulation, or unless it were shewn to be the *Péshwá's* money, of what importance is it that it was brought from Rhygur? By the capitulation the besieged were "to carry away their goods and chattels, also their ready cash, &c.;" so that the taking the money away, even after the capitulation, would be no breach of it, unless it were the *Péshwá's* money. But how does the fact of its being in Rhygur prove that it was the *Péshwá's* money? Naroba was *Kilaahdár* of Rhygur, and might naturally have his own money there. Besides, there is no evidence to prove that the money supposed to have been taken from Rhygur was the same as that found in Naroba's house.

The only circumstance from which the defendants could presume it was the *Péshwá's* money was, that Naroba had been, nearly up to the breaking out of the war, the *Khásgát*, or private treasurer, to the *Péshwá*.

From this circumstance alone a vague suspicion that Naroba had some of the *Péshwá's* money seems to have suggested itself to Captain Robertson, and to have led him to all these extraordinary proceedings. Even at this day the defendants have not been able to ad-

duce any evidence that the money seized was the *Péshwá's*, except the supposed admissions or confessions of Naroba, obtained from him after the seizure by means the most illegal and oppressive.

Many months after Poonah had been in our undisturbed and peaceable possession; many months after Mr. Elphinstone's proclamation, in which he promises that all property real and personal shall be protected, and that Courts of Justice shall be immediately established; and many months after their actual establishment in Poonah and the adjacent country, when the inhabitants had as much right to the protection of the Courts of Justice as the inhabitants of Bombay; Naroba, a person of high rank in the former empire, without even the imputation of any offence, and without the form or pretence of any legal proceeding, is taken from his house, and wife, and family, and thrown into the common jail. His *Gumáshtah* shares the same fate, with the additional severity of being kept in irons. Naroba's house is entered by a military force, his treasure taken without a shadow of evidence that it was not his own, and his family reduced to a state of destitution so complete, that his wife is under the necessity of borrowing Rs. 20. They are kept in prison many months, during which Captain Robertson endeavours to obtain admissions from them to justify these acts; and in this Court the defendants offer in evidence a paper signed by Naroba's *Gumáshtah* in jail, dictated to him, in the presence of Captain Robertson, admissions obtained from Naroba in jail, and the bond by which Naroba submits himself to whatever their honours might please to order to be done to him.

Even after his release the proceedings are equally extraordinary. His papers having been seized by Captain Robertson, he is interrogated as to the most intricate accounts of immense sums, and of many years; and thus, by an inversion of the most obvious rules of justice, his property is first seized and detained without even a pretence of any right, and then he is required to shew his own title to it, and that after he is deprived of the means of so doing by the seizure of his papers and accounts.

We will now consider the other grounds of defence relied on by the counsel for the defendants, beside that of the money being the property of the *Péshwá*.

One is, that Naroba was an alien enemy at the time of the seizure of the money. It is not necessary to consider whether this would, in point of law, be a good defence, the proposition not being that Naroba was an alien enemy at the time of his death, or that the plaintiff, as the usual form of the plea is, was an alien enemy at the time of action brought; because I am clearly of opinion that Naroba could not be deemed an alien enemy at the time of the seizure.

At that time Poonah, where the money was seized, and where Naroba was resident, had been in our undisturbed possession eight months; and above five months before the seizure the proclamation had been issued by Mr. Elphinstone, who therein described himself as sole Commissioner for the settlement of the territories *conquered* from the *Péshwá* "to the inhabitants of the *Péshwá's former dominions.*"

In this proclamation Mr. Elphinstone states:—"By these acts of perfidy and violence, Bajee Row has compelled the British Government to drive him from his *Masnad*, and to conquer his dominions. For this purpose a force is gone in pursuit of Bajee Row, which will allow him no rest; another is employed in taking his forts; a third has arrived by the way of Amednuggur; and a greater force than either is now entering by Candiesh, under the personal command of his excellency Sir Thomas Hislop. A force under General Munro is reducing the Carnatic, and a force from Bombay is taking the forts in the Concan, and occupying that country; so that in a short time no trace of Bajee Row will remain. The Rájá of Sattára, who is now a prisoner in Bajee Row's hands, will be released, and placed at the head of an independent sovereignty, to such an extent as may maintain the Rájá and his family in comfort and dignity. With this view the fort of Sattára has been taken, the Rájá's flag has been set up in it, and his former ministers have been called into employment. Whatever country is assigned to the Rájá will be administered by him, and he will be bound to establish a system of justice and order. The rest of the country will be held by the Honourable Company. The revenue will be collected for the Government; but all property, real or personal, will be secured. All *Watan* and *Inaám* (heriditary lands), *Warshawshun* (annual stipends), and all religious and charitable establishments, will be protected, and all religious sects will be tolerated, and their customs maintained as far as is

just and reasonable. The farming system is abolished; officers shall be forthwith appointed to collect a regular and moderate revenue on the part of the British Government, and to administer justice; and to encourage the cultivators of the soil, they will be authorized to allow of remissions in consideration of the circumstances of the times. All persons are prohibited paying revenue to Bajee Row, or his adherents, or assisting them in any shape: no reduction will be made from the revenue on account of such payments. *Watandárs*, and other holders of land, are required to quit his standard and return to their villages within two months from this time. The *Zamíndárs* will report the names of those who remain; and all who fail to appear in that time shall forfeit their lands, and shall be pursued without remission until they are entirely crushed. All persons, whether belonging to the army or otherwise, who may attempt to lay waste the country, or to plunder the roads, will be put to death wherever they are found."

It is impossible to doubt, therefore, that, long before the taking of the money, Poonah was considered as a conquered country, and that all the peaceable inhabitants had been received into the protection of the conqueror.

It also appears, from all the evidence, that Courts of Justice had been established five months, and Captain Robertson had been appointed by Mr. Elphinstone, in the February before, Magistrate and Judge, with both civil and criminal jurisdiction over the city of Poonah and the adjacent country.

What, then, is the clear law upon this subject, as laid down by Lord Mansfield?[1] "A great deal has been said, and authorities cited, relative to propositions in which both sides exactly agree, or which are too clear to be denied. The stating of these will lead us to the solution of the first point.

"1st, A country conquered by the British arms becomes a dominion of the King, in the right of his Crown, and therefore necessarily subject to the legislative power of the Parliament of Great Britain.

"2dly, The conquered inhabitants once received into the conqueror's

[1] *Campbell* v. *Hall*, Vol 20. State Trials, p. 322.

protection, become subjects, and are universally to be considered in that light, not as enemies or aliens.

"3dly, Articles of capitulation upon which the conquest is surrendered, and treaties of peace by which it is ceded, are sacred and inviolable, according to their true intent."

To apply these propositions to the present case, Mr. Elphinstone's proclamation must be considered as a convention between the conquerors and the inhabitants of the conquered country, and equally sacred and inviolable as articles of capitulation or treaties of peace; and it is clear that Naroba, at the time of the seizure of the money, had been taken into the protection of the conqueror, and was therefore a subject of the King, and not an alien enemy: nor can it make any difference that some of the forts which had belonged to the *Pêshwá* in different parts of the country held out long after Mr. Elphinstone's proclamation, whether they were held out by refractory Arabs against the will of the commander, or even by his orders. The *Péshwá* himself had surrendered to Sir John Malcolm on the 3d of June, that is, about six weeks before the seizure of the money.

Another ground of defence is, that the money was taken *jure belli.*

The laws of war, however, cannot apply to persons who have been taken into the protection of the conqueror, or to those with whom such convention is made as just stated. That eminent Judge, Lord Stowell, says:[1] "There is no suggestion in the claim that any other persons are aggrieved than merchants of Genoa, who were decidedly enemies; unless it can be shewn that they had been taken into the protection of this country, and that the seizure was made after the time when they had so become entitled to protection under the capitulation, undoubtedly, if the seizure was made after that time, it would be considered not as the exercise of any rights of war, but as mere lawless rapine and plunder. The question, therefore, appears to me to respect entirely the time of seizure. If it is shewn to have been before the convention, it will be in exercise of the rights of war: if after, it will be liable to the description that I have given of it, of illegal plunder and violence."

[1] 4 Robinson's Adm. Rep. 397.

Another ground of defence is, that the money was taken *bonâ fide* as booty, and therefore that the seizure of it is not a question for a Municipal Court.

This argument is grounded upon the decision of *Le Caux* v. *Eden*, Douglas 594, respecting sea prize, which has been followed by other decisions, and is unquestioned law. But, in the first place, I am of opinion, considering the time and circumstances under which this money was taken, that it cannot be considered to have been taken as booty; and in the next place I am of opinion that there is no analogy in this respect between booty and sea prize. The ground of the decision with respect to sea prize is, that the Courts of Admiralty have jurisdiction over it. But to what jurisdiction could the plaintiff resort for redress for this injury? certainly not to the Court of Admiralty. His redress must be in the Municipal Court, in the Common Law Courts of Westminster, or the King's Court here: as to booty or plunder there have been no decisions. In *Lindo* v. *Rodney*, Douglas 613, Lord Mansfield says: "As to plunder, or booty, in a mere continental land war, without the presence or intervention of any ships, or their crews, it never has been important enough to give rise to any question about it. It is often given to the soldiers upon the spot; or wrongfully taken by them, contrary to military discipline. If there is any dispute, it is regulated by the Commander-in-chief. There is no instance in history or law, ancient or modern, of any question before any legal judicature ever having existed about it in this kingdom. To contend that such plunder was within the rules and jurisdiction of the Prize Court might be opposed by the subject matter, the nature of the jurisdiction, the person to whom it is given, and the rules by which he is to judge. Therefore, the counsel have confined their argument to reprisals ashore by a naval force; at least I shall consider it as so confined, without entering into any question about booty in a mere land war, as to which I have no light to go by; and it is not now necessary to be decided *neque teneo neque dicta refello*."

The last ground of defence is, that an executive Government, having power of making war and peace, is not amenable to any Court, here or at home.

With respect to this proposition I confess I am at loss (even were it

founded in law) how to apply it. It would not of course apply to Captain Robertson, who has not produced the order of any Government for his act; nor could it apply to Mr. Elphinstone, as he had not the power of making peace or war. But the proposition was afterwards, in the course of the argument of the counsel for the defendants, advanced in a different and more general form, namely, that the acts of a Government are not subject to the jurisdiction of any Court; and to maintain this point several cases are cited, such as *Burdett* v. *Abbott*, 1 East, 1, which has certainly nothing to do with this point, or with the case at all, but which was dwelt upon at very great length; *The Nabob of Arcot* v. *The East-India Company*, 2 Ves. jun. 56, which merely decides that a political treaty between two independent states (the East-India Company, though mere subjects as respects the mother country, having acted as an independent state in that transaction) is not a subject of a bill in equity; and *Penn* v. *Baltimore*, 1 Ves. jun. 444, which also has no reference whatever to the point.

It is not necessary to inquire whether Mr. Elphinstone, as Commissioner, could be considered as constituting a Government. It is quite clear that the acts of a Government are (except when specially exempted by Statute, as in some cases they are, from the jurisdiction of this Court) subject to the jurisdiction of the Municipal Courts. This is established by a series of decisions of unquestioned and unquestionable authority, and it only appears extraordinary that it could ever have been made a question here. What says Lord Mansfield in *Fabrigas* v. *Mostyn*, Vol. 20, State Trials, 228. 231, 232: "The other two grounds which are enforced to-day are, if I take them right—but I am under some difficulties, because they are such propositions that you may argue as well whether there is such a Court existing as this which I am now sitting in—the first is, that he was Governor of Minorca, and therefore, for no injury whatsoever that is done by him, right or wrong, can any evidence be heard, and that no action can lie against him; the next is, that the injury was done out of the realm: I think these are the whole amount of the questions that have been laid before the Court.

"But to make questions upon matters of settled law, where there have been a number of actions determined which it never entered into a man's head to dispute—to lay down in an English Court of Justice such

monstrous propositions as that a Governor, acting by virtue of letters patent under the great seal (and it would be ridiculous to maintain that a Company's Governor could have more power than a King's Governor), can do what he pleases; that he is accountable only to God and his own conscience—and to maintain here that every Governor, in every place, can act absolutely; that he may spoil, plunder, affect their bodies and their liberty, and is accountable to nobody—is a doctrine not to be maintained: for if he is not accountable in this Court, he is accountable nowhere. The King in Council has no jurisdiction of this matter: they cannot do it in any shape; they cannot give damages; they cannot give reparation; they cannot punish; they cannot hold plea in any way. Wherever complaints have been before the King in Council, it has been with a view to remove the Governor; it has been with a view to take the commission from him which he held at the pleasure of the Crown. But suppose he holds nothing of the Crown, suppose his government is at an end, and that he is in England; they have no jurisdiction to make reparation to the party injured; they have no jurisdiction to punish in any shape the man that has committed the injury. How can the arguments be supported, that, in an empire so extended as this, every Governor, in every colony and every province belonging to the Crown of Great Britain, shall be absolutely despotic, and can no more be called in question than the King of France? and this after there have been multitudes of actions, in all our memories, against Governors, and nobody has been ingenious enough to whisper them that they were not amenable. In a case in Salkeld, cited by Mr. Peckham, there was a motion for a trial at bar in an action of false imprisonment against the Governor of New York; and it was desired to be a trial at bar, because the Attorney-General was to defend it on the part of the King, who had taken up the defence of the Governor. That case plainly shews that such an action existed: the Attorney-General had no idea of a Governor's being above the law. Justice Powell says, in the case of *Way* v. *Yally*, in 6 Modern 194, that an action of false imprisonment had been brought here against the Governor of Jamaica for an imprisonment there, and the laws of the country were given in evidence. The Governor of Jamaica, in that case, never thought that he was not amenable. He defended himself. He shewed, I suppose,

by the laws of the country, an Act of the Assembly which justified that imprisonment, and the Court received it, to be sure, as they ought to do. Whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried. I remember (it was early in my time, I was counsel in it) an action against Governor Sabine, and he was very ably defended: nobody thought the action did not lie against him. He was Governor of Gibraltar, and he barely confirmed the sentence of a Court-martial, which tried one of the train of artillery by martial law: Governor Sabine affirmed the sentence. This plaintiff was a carpenter in the train. It was proved at the trial that the tradesmen that followed the train were not liable to martial law: the Court were of that opinion, and therefore that the defendant was guilty of a trespass in having a share in that sentence, which punished him by whipping. There is another case or two, but they do not occur to me at present."

Having disposed of these different heads of defence, I think the plaintiff is entitled to a verdict against Captain Robertson. I think that he is entitled to a verdict against Mr. Elphinstone also. Mr. Lumsden, a witness for the defendant, says, that Captain Robertson did political business under Mr. Elphinstone; and it is in evidence that Naroba applied to Mr. Elphinstone, whilst Commissioner, about the money, and that he promised to make inquiry about it, and to restore it. Mr. Elphinstone, too, in his letter to Captain Robertson, orders "that the money should remain with Captain Robertson on account of Government till the Governor-General's commands are received;" thus not only adopting Captain Robertson's act in seizing it, but ordering him to keep it till the commands of the Governor-General should be known.

With respect to the Company, I am of opinion that there is no evidence to affect them. A body corporate may be rendered liable, it is true, to an action of trover; but the only evidence in this case is, that the proceeds of the money were paid to the servants of the Company. There is no evidence of their having adopted the act of their servants, nor is there any evidence of a demand upon, and refusal by, the Company.

The only remaining point, then, to be considered, is, the amount of

the damages. I think that the plaintiff is entitled, in addition to the value of the twenty-eight bags taken from Naroba's house, to recover the value of the five bags delivered by Naroba to Captain Robertson the day after his release. I cannot consider that these five bags were delivered up by Naroba voluntarily, but think that they were extorted from him by the apprehension of being again thrown into prison. He was released only upon his promising to deliver up those bags, and upon his brother-in-law entering into a bond, or becoming bail, for his personal appearance.

My Lord Coke says, "that for menaces, in four instances, a man may avoid his own act—1st, for fear of loss of life; 2dly, of loss of member; 3dly, of mayhem; 4thly, of imprisonment;" and it is impossible to doubt that Naroba delivered up these five bags from fear of being again sent to prison.

The plaintiff claims interest upon the money from the time it was tortiously taken and converted, to the day of signing final judgment. Lord Mansfield says, in *Fisher* v. *Prince*, 3 Burrowes 1364, "In trover for money numbered, or in a bag, the Court have ordered it to be brought in; yet the jury may give more in damages: they may allow interest, and, in some cases, they ought." It is not necessary to inquire, however, what would be the decision in this case of the Courts at Westminster, as we are not bound by the rules of practice of the English Courts.

That it is merely a rule of practice which limits the giving of interest in the English Courts is quite clear, not only upon principle, but from the judgment of the Court of King's Bench in the case of *Badger*, 2 Barnewall and Alderson 691, where an arbitrator had allowed interest in a case in which it would not have been allowed by the Courts of law or equity.

Lord Chief Justice Abbott in this case said—"The Court will not set aside the award in consequence of the allowance of interest. If an arbitrator act contrary to a general rule of law, it is undoubtedly the duty of the Court to set aside his determination. But there is a material distinction between those rules which are founded on the immutable principles of justice, from which neither the Court nor an arbitrator can be allowed to depart, and those which depend on the practice of the Court. From

the latter, indeed, the Court will not depart, because it is of great importance in Courts of Justice to adhere to them, even though it may operate to the prejudice of some particular case; for by abiding by general rules we avoid that uncertainty which would be productive of very great inconvenience to the suitors of the Court. But an arbitrator, to whom a particular cause is referred, is not placed in this situation: he is not, as it seems to me, bound by those rules of practice which are adopted by the Court, for those reasons which I have stated; and as this rule of not allowing interest on unliquidated accounts is a rule of practice, I think that the arbitrators in this case were not bound by it.

Mr. Justice Bayley concurred.

Mr. Justice Holroyd said—"The ground for making a general rule is, that in the great majority of instances such rule is productive of advantage; and though it may be productive of inconvenience in a particular case, it is still abided by, in order to avoid that uncertainty which would otherwise occur, and which is worse. But this reason does not apply to a case before an arbitrator, whose duty it is to do justice according to the circumstances of the particular case; and no mischief can arise from his not abiding by a general rule. I think that this is a case in which the arbitrators might allow interest.

Best, J.—"The same principle which governs our present decisions will be found in the case of *Prentice* v. *Reed*, 1 Taunt. 151. It does not appear that the arbitrators here have violated any general rule of law, but they have only not complied with the practice of the Court. It is this very circumstance which, in many cases, makes a decision by an arbitrator preferable to that of the Court; viz. that the former is not bound by the strict rules of practice, but may do full justice according to the particular circumstances of the individual case."

There can be no principle on which the plaintiff should not be entitled to interest, as much upon liquidated, as upon unliquidated, damages; or why he should not be as much entitled to the profit of money, as to the mesne profits of land withheld from him.

With respect to the practice of this Court in these cases I had occasion to inquire into it very soon after I arrived in this country. An action had been brought by one Cursetjee Manockjee against the East-

India Company for unliquidated damages for the breach of an agreement. It was tried before Sir Anthony Buller, who then sat as Recorder here, and he allowed interest on those damages at six per cent. The right to interest was not questioned by the counsel for the Company; but Sir Anthony Buller, upon application, granted a new trial, on the question, among others, whether the interest had not been calculated at too low a rate. The new trial came on before me. No question of the plaintiff's right to interest was even hinted at by the counsel for the Company; but before I decided the question I thought it right to make inquiry into the practice of the Court, and was informed, as well by all the officers as by all the practitioners, that it had been the practice to give interest in such cases at nine per cent., and that compound interest.

It is clear we should not do full justice to the plaintiff unless we gave interest. The defendants, too, it appears in evidence, have used the money; and we know, from documents, that the Honourable Company are to pay interest at six per cent. to those entitled to the prize-money. I therefore think that the plaintiff is entitled to interest, but only at six per cent. compound interest, that being, I think, about the average rate for the last eight or nine years on good security.

No. III.

IN THE MATTER OF THE LAST WILL OF GORDON.

[*Cor.* Sir JOHN AWDREY, J., in Chambers.]

26th August 1833.

Sir J. AWDREY, J.—This case was moved before me in Chambers, during the last vacation; but in consequence of the importance of the question raised, and the obscurity in some particulars of the enactment on which it depends, time was taken to consider of the decision, and it has been thought expedient to give it whatever publicity might arise from its delivery in open Court during term.

The deceased, a military officer, died on service with his regiment, leaving a will, but no executors within this jurisdiction; and leaving as assets within the jurisdiction (besides such property as was immediately connected with his military character) a considerable balance due to him by a house of agency in Bombay.

In consequence of this last item the Registrar claims to administer, notwithstanding the prohibitory words at the end of the 6th Geo. IV. c. 61. s. 1.; and the question is, whether the word "effects" mentioned in that Statute (and in respect to which the prohibition is introduced) comprises the whole personal estate, or only certain parts of it connected with the military service of the deceased.

The declared object of the enactment is to render more effectual certain beneficial provisions of two recited Acts, which Acts, therefore, it may extend, but cannot narrow. The construction, however, contended for by the Registrar, will not, in my clear opinion, narrow the import of the corresponding words in those Acts (58th Geo. III. c. 73. s. 1. 4th Geo. IV. c. 81. s. 49.), which provide that regimental debts (therein defined) shall be paid out of any arrears of pay, or out of the effects, or the proceeds of the effects, or out of any prize or bounty-money, of any officer or soldier dying while on the service, in preference to any other debts, claims, or demands, upon the estate and effects of such officer or soldier.

No man who thought, as the framer of this clause must have done, that "estate and effects" were the proper words to describe the personal estate at large, would, in the same clause, two lines before, have used a cumbrous enumeration, tending to lead other readers' minds to a particular description of property, rather than to the whole, unless the provision was really intended to apply only to a particular description of property.

When a similar provision for the Honourable Company's army was requisite, this clause was reconsidered—was not absolutely copied, but by a slight alteration, which tends more strongly to lead the mind to the particular nature of the effects meant, the words "arrears of pay and allowances, any prize or bounty-money, or the equipage, goods, chattels, and effects," are substituted, and again placed in close juxta-position with the words "estate and effects." Surely a man whose attention had been drawn to the particular enumeration,—who had advisedly recast it,—would have used there, as well as immediately below, the unequivocal words "estate and effects," if he had meant his enumeration to be tantamount to those words.

This is, to my mind, conclusive. The legislature hardly would, the first

time unadvisedly, certainly not the second time, advisedly, have put such different expressions in such close contact, unless the intention had been to express different things; viz. in the one case certain parts of the estates readily accessible to the military officer, and connected with the military character, and in the other (as is indisputable) the personal estate at large.

But I will name a few more of the many subsidiary arguments which occur to me, as tending to this construction.

1st, The favoured debts are called regimental debts: the fund out of which they have priority, and which is placed in the same hands, is what may, in precisely the same sense, be called regimental assets.

2dly, The officer on the spot, who would probably be employed by the Secretary-at-War, would have peculiar facilities in collecting this particular class of assets; but it would be next to impossible for him, when on distant service, to collect a considerable and intricate estate, and there is no adequate provision for the administration of it; whilst the provisions for remittance of the surplus, after paying one class of debts only, and the particular exception to the law of Probate and Administration, shew that, except as expressly excepted, it should be unaltered.

3dly, The general object of these enactments, as appears from the subsequent Sections of the 58th Geo. III. c. 73., is to provide a summary mode of dealing with small properties, which can ill bear the expense of a regular probate or administration, not to dispense generally with the protection of the law to the estates of deceased persons.

Lastly, The Articles of War, which are too untechnical in their language to amount to any thing like a legal authority in themselves, may yet be fairly cited, in consequence of the reference of the 6th Geo. IV. c. 61. to them, and they limit the officer's duty to effects in camp and quarters.

I am therefore clear, that a debt due by an agent on a private account would not be included in the effects, &c. for which the Stat. 58th Geo. III. c. 73. & 4th Geo. IV. c. 81. s. 49. provide. But it may be said that 6th Geo. IV. c. 61. is an enlarging Statute, which, seeing the beneficial effects of the other enactments, has extended their operation, and that it has provided for cases where a regular administration is necessary, by allowing the officer to require or authorize the Registrar

to interpose and that it must be presumed the officer will do his duty, though there be no special provision to make him responsible.

I do not, however, consider these propositions tenable to the extent requisite to defeat the Registrar's present application, whether on the words of the Act or the general principles of construction applicable to the subject matter.

On the words, the object of the Act is to make useful provisions more effectual, which it plainly does by giving the officer power to sue without taking out letters of administration, which, if any of the enumerated effects had been withheld from him, he could not before have done; but this is very different from extending the provisions to new subject matter.

There is not the slightest expressed intention of applying the new provisions to other effects than those mentioned in the previous Statutes referred to, and on which a construction had been put by the Articles of War, also referred to. And as to any implied intention, though the word "effects" would, in its utmost extent, include estate and effects, as well as the two enumerations of effects; yet it is far more probable that it should be silently substituted for terms to which the provisions in question belonged, than for a term mentioned with another purpose,—for two varying modes of expressing the same thing, which the term "effects" would well cover, neither of them very compendious or definite in itself, and neither sanctioned by frequent use, than for a short and well-known legal formula.

Lastly, the prohibition is to interpose "in relation to any such effects," which tallies best with the idea of its being limited to particular species of effects, not "to the effects of any such officer or soldier," as might have been expected if the limitation respected the person only, and not the nature of the property also.

And as to the provision for calling in the Registrar, it is easy to put cases where rights, coming strictly within the enumerated classes of assets, may yet be sufficiently intricate and important to make the interposition of a civil officer expedient, even if we could put out of view all those contingencies of a military life, which would render it inconvenient for the officer to follow up his remedy in person.

As to the general principles of construction, I think that the Act

must be liberally construed to advance the benefit and suppress the mischief.

It must then, in cases to which it extends, be liberally construed to effectuate the recovery of effects, and the cheap and speedy transmission to the persons really entitled, so far as is consistent with the protection of parties interested; but it must never be forgotten that the Act makes no difference in those who are entitled, that creditors are beneficially entitled, in preference to next of kin; and that creditors within the jurisdiction are legally entitled also, unless the next of kin, by themselves or their authorized agent, take upon themselves the responsibility of administrators.

But I take it to be an undeniable proposition, that so far as an Act has a tendency to prejudice creditors, particularly in a mode not appearing to have been expressly under the contemplation of the legislature, it must be strictly construed; and that an Act providing generally for the transmission of assets beyond the jurisdiction, without the existence of a responsible administrator within it, has such a tendency, will hardly be disputed. I therefore think that, so far as this Act restrains the Registrar's right to interpose, where no other person having a prior right is ready to take out administration, this Act must be strictly construed.

That with such a construction as leaves him the right to administer, without requisition or authority from the military officer, all assets unconnected with the military character of the deceased, the words and object of the Act will be satisfied.

That the assets now in question have no apparent connection with that character, and therefore that this application must be granted.

As this application is *ex-parte*, of course the present decision will not preclude any thing which may hereafter be urged, in case an adverse interest should be brought before the Court. But I have had the opportunity of hearing the arguments urged in other cases, by a succession of learned persons; and it is only in deference to doubts raised by them that I have taken time to consider the propriety of an application which is certainly conformable to the practice which I found established when I arrived at the close of 1830. As, however, it had passed *sub silentio*, and therefore possibly with the attention of the Court having been called to the strong prohibitory words of the 6th Geo. IV. c. 61. s. 1., I

permitted it to be controverted; and the late Mr. Hammond, in two several applications to the Court, strongly animadverted on the legality of the practice, but withdrew them both on being called on by the counsel for the Registrar to name his client.

Afterwards a case *in bonis* Lutyens was argued before me in Chambers (I think by Mr. Morley), and again before my Lord, on his arrival, and myself; but ultimately determined, on the ground that the deceased did not die in the service within the meaning of the Acts.

Afterwards, in the goods (I think) of Quarter-Master Hales, the Registrar's claims were controverted by two or three other learned persons (one of whom is still an ornament to this Court); but the decision only extended to this, that the Court would grant a limited administration to a person of its own nomination, rather than allow the prohibition in the 6th Geo. IV. to prejudice a creditor who was not, himself, by the rules of the Court, in a condition to take out letters of administration.

The CHIEF JUSTICE concurred in this opinion and reasons.

N.B. Time was taken to consult Judges at Calcutta and Madras, and opinions received from some of them, which were considered before forming an opinion.

No. IV.

CURSONDASS HUNSRAZ
versus
RAMDASS HURRIDASS.

28th July 1842.

ON the 30th June 1841 this case coming on for hearing, *Crawford*, who appeared for the complainant, opened the bill, and stated that the case came on *ex-parte;* that the bill must be taken *pro confesso*, there being a certificate that the defendant had absconded, and had not answered the amended bill. The complainant's title was admitted. Damother, the residuary legatee, having died at twelve years of age, the complainant became heir-at-law.

On the 26th of July 1842 *Crawford* entered more fully into the facts of the case; and on the 28th of the same month the Honourable Mr. Justice PERRY delivered the following judgment:—

When the bill in this case was read the other day, in order that such

a decree might be pronounced upon it as the plaintiff could shew himself entitled to, I rather doubted whether any circumstances of fraud were alleged which would warrant the Court in setting aside the agreement of July 1810; for as the plaintiff, Cursondass, is of mature age, appears to have entered into the agreement with his eyes open, and to have conceived it upon the whole to be for his advantage, his folly and weakness in entering into it would scarcely form grounds for equitable relief.

However, upon considering the case more attentively, I do not think that the fraudulent nature of the agreement is the proper basis upon which to rest the decision; but that the Court is bound to take a higher position, and declare, on grounds of public policy, that an agreement such as this, obtained by an executor from the next of kin entitled to the residue, is not such a contract between dependent parties as the Court will sanction or enforce. The parties are in litigation, first, with respect to the representative character, which Ramdass Hurridass enjoys by the decision of a competent Court; secondly, with respect to the possession of the assets, which Ramdass has obtained by virtue of that character. Ramdass being in this position, therefore, and having all the funds in his disposal, either to distribute to the next of kin, or to make away with, as the case may be, enters into an agreement with Cursondass, the sole next of kin, but then an insolvent, to pay him over the residue on receiving Rs. 30,000.

The statement of the facts is enough to shew that one of the contracting parties had such means of undue influence over the other, by the relations existing between them, as to make all contracts between them, whilst that relation existed, however otherwise unexceptionable, void. *Hylton* v. *Hylton*, 2 Ves. 549; *Wright* v. *Proud*, 13 Ves. 136; *Wood* v. *Downes*, 18 Ves. 120.

In this case, however, it clearly appears that the Rs. 30,000 were to be paid by Cursondass, not as a voluntary gift, and to buy peace, but to satisfy the claim made by the executor for his commission; and this by itself would be sufficient to warrant this Court in setting aside this agreement.

The evidence of this fact is contained in a letter from Messrs. Patch and Bainbridge, the solicitors of Ramdass. The prayer of this bill,

however, does not pray that the agreement should be set aside, probably on the grounds that the plaintiff having agreed in the breach of trust, which Ramdass, as executor, seemed willing to commit, he is not entitled to ask for relief upon that matter.[1] It may be sufficient, therefore, to pronounce a decree as prayed.

No. V.

M'INTYRE

versus

HEERJEEBHOY RUSTOMJEE.

12th September 1842.

On the 10th September 1842 *Howard* obtained a rule *nisi* for a writ of *ne exeat regno* against the defendant Heerjeebhoy Rustomjee. The *Advocate General* shewed cause against the rule in the course of the day.

Judgment delivered on the 12th September 1842, by Sir Erskine Perry, J.

In this case an application was made by the plaintiff for the writ *ne exeat regno* to restrain the defendant from leaving Bombay until he gave security for the amount demanded for him by the plaintiff's bill. The circumstances relied on by the plaintiff are in substance as follow:—

In April 1840 the plaintiff, M'Intyre, being then in command of the barque Ardaseer, which was at anchor off the island of Macao laden with opium, went on shore, and by verbal contract agreed to sell to the defendant, Heerjeebhoy, fifty chests of opium at 450 dollars, for cash on delivery. The opium was to be delivered at Jonkkoo, which is about three or four hours' sail from Macao, and on board a receiving ship, there lying, belonging to Heerjeebhoy.

Heerjeebhoy accordingly gave him a sealed note to one Lyons, the captain of his receiving ship, and M'Intyre proceeded there on the same day with the vessel and the opium on board. M'Intyre gave Heerjeebhoy's letter to Captain Lyons, and offered to deliver the opium also on receiving cash or securities; but the Captain refused to accept the opium on such terms, having, as he alleged, received no order to that effect from Heerjeebhoy. M'Intyre thereupon informed him that

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[1] See per Lord Eldon, C. 3. Swanst. 64.

he should remain at Jonkkoo a few days, and that the Captain had better communicate with Heerjeebhoy. The Captain wrote accordingly; but no answer having arrived from Heerjeebhoy, the plaintiff, M'Intyre, at the end of six days, sailed back with his opium to Macao, and there informed the defendant that he had not delivered the opium to Captain Lyons, on the ground of his declining to pay for it, and that he had given him six days to take it. M'Intyre thereupon sold the opium to other parties, and again left Macao in further prosecution of his voyage. He returned to it about the 18th of May, and having gone on shore, he was arrested at the suit of Heerjeebhoy for 7600 dollars, as the alleged measure of damage arising out of the non-delivery of the opium. M'Intyre gave bail for his appearance in the Portuguese Court on the Monday following; and on appearance there the Judge informed him that the matter must be settled by arbitration, and the Judge thereupon nominated Mr. W. Spratt Boyd as arbitrator for Heerjeebhoy, and ordered the plaintiff to select an arbitrator for himself. M'Intyre protested against the jurisdiction of the Court altogether, and he especially protested against Mr. Boyd as an arbitrator, as he believed him to be in partnership with Heerjeebhoy in opium transactions. The Judge, however, overruled the objection, on the ground that Heerjeebhoy was determined to have Mr. Boyd, and informed the plaintiff that he could not be allowed to leave the Court till he also had named an arbitrator. The plaintiff thereupon named one of the persons present in Court, and the Judge named an umpire. M'Intyre shortly after sailed from Macao, having put in bail to stand by the award, but this also, as he alleges, upon compulsion; and on the 17th June following Mr. Boyd and the arbitrator named by M'Intyre made an award against him for 8700 dollars, which is equivalent to about Rs. 19,200. This sum, it appears, has been actually paid by the plaintiff's agents.

The plaintiff alleges that Heerjeebhoy had no cause of action whatever against him, by reason of a fraudulent conspiracy between the Portuguese Judge and Heerjeebhoy, to which Mr. Boyd and others became more or less parties. The plaintiff has been engaged in several voyages since that period; and having arrived in Bombay in August, and discovered that Heerjeebhoy was residing here, he immediately took measures

for proceeding against him; and on the 8th of September last, having learned that Heerjeebhoy was about to proceed in a couple of days to China on board the Inglis, he comes to this Court to ask its compulsory process, in order to put the matter in a train for litigation.

The question which arises on this state of facts appears to be, whether it is competent to this Court to entertain a suit, the object of which is to deprive a party of the fruits of a decision he has obtained in a foreign tribunal. By what has been termed the comity of nations, the judgments of foreign Courts are undoubtedly entitled to the greatest respect: by the English law in particular they have more weight attributed to them than they receive in some of the codes of other civilized nations, in the French code for example. The English law presumes that foreign Courts proceed on the same fixed principles of right and justice which govern our own tribunals, and it tends itself to enforce their decision whenever no recognized principle of the *jus gentium* appears to have been violated. Furthermore, it zealously refuses to sit in appeal on any decision on the merits, which have been already investigated by a competent tribunal.

Now although, in this case, many of the statements made by the plaintiff are rather awakening, especially as to the mode in which he was forced into Court, and an arbitrator imposed upon him by the Judge, I think it is our duty to presume, until the contrary be shewn, that the Portuguese Court proceeded in conformity with their law. According to English jurisprudence, it is of the essence of judgment by arbitration, that the litigating parties should freely consent to the matter being referred; and very large discretionary powers, both over law and facts, are therefore given to arbitrators, as being judges voluntarily selected by the parties themselves. But in examining the procedure of a foreign tribunal, it is necessary to divest one's mind of all attachment to mere technical rules; and if the Portuguese law authorizes the Judge to drive the parties into arbitration against their consent, I cannot say that the practice is so contrary to first principles as to induce us to consider all the proceedings which have been based from it a nullity.

Again, it does not appear but that the plaintiff had an opportunity of stating his case in person, and urging all the facts he brings forward here before the arbitrators: and as he is telling his own story, and is

silent upon this subject, it is too much to call upon us to presume that the arbitrators made their award without having fully heard him or his agent; but if the arbitrators did fully hear the case, and if they heard both the plaintiff and defendant, and the other witnesses in the cause, with all the local advantages which always must attend a trial on the spot, I should be very unwilling to admit that their *bona fide* decision, however much it might clash with my own views, was examinable in this Court. And on this poiut it will not fail to be observed that the arbitrator, nominated at least, if not freely chosen, by M'Intyre, joined in the award against him, and that the umpire was never called in.

There are two other distinct grounds, however, on which it is contended that this suit is maintainable; first of all, because M'Intyre was not liable to the jurisdiction of the Portuguese Court; secondly, because the judgment was obtained by fraud. Undoubtedly either of these objections to the validity of a foreign judgment is sufficient to warrant an English Court in entering into an examination; and I am of opinion that both are sufficiently raised, on the plaintiff's affidavit, to entitle him to put the matter in suit. With regard to the first, it appears that the plaintiff and defendant, both British subjects, enter into contract at Macao, with respect to property out of the Portuguese jurisdiction, and that the plaintiff, M'Intyre, was undoubtedly not domiciled in that island. According to the Common Law, which takes but little notice of domicile, if foreign merchants come within the jurisdiction of an English Court merely for a period of time long enough to be served with process, the competence of the English Court accrues. But this is not the case in countries governed by systems founded on the Civil Law—in Scotland for instance—where the defendant must reside forty days before jurisdiction over him arises. And in this case M'Intyre alleges that the Portuguese Court had no jurisdiction over him; and we find his statement corroborated by the letter of Captain Elliot, R.N., who was the representative of British interests in those waters. But if the Portuguese Court was not one of competent jurisdiction, its judgment was a nullity, the money obtained under it does not belong to Heerjeebhoy, and the matter is a fit subject for inquiry in this Court.

Again, the plaintiff distinctly alleges that the judgment was obtained

by the fraud of the defendant, conjointly with the Judge and one of the arbitrators. Whether it were so or not we have not now to determine, but, that a party who alleges himself to have been injured by a judgment obtained by fraud has a right to seek relief in this Court. "If," says LORD ELDON, 2 Ves. jun. 135, "a judgment at law was obtained, a bill shewing that it was obtained against conscience by concealment, would open it to relief in this Court." "Fraud," in the language of LORD COKE, "avoids all judicial acts, ecclesiastical and temporal."

But if the judgment of an English Court of Law is thus examininable, it follows that the comity of nations cannot entitle foreign judgments to greater immunity; and the cases of *Rex* v. *Neville*, 2 Barn. and Ad. 299, *Price* v. *Dewhurst*, 8 Sim. 279, fully shew that our Courts will examine into, and set aside, a foreign judgment partially obtained. A doubt passed in my mind during the argument, whether the plaintiff, M'Intyre, ought not to have appealed from the sentence of the Portuguese Court to the Court above, if there be one; or at all events to have shewn that no such Court existed, according to the principle which prevails in our law with regard to the judgments of the Supreme Courts. But on reference to *Rex* v. *Neville* I find that no appeal was made to the Court of Cassation, and that in *Price* v. *Dewhurst*, though lodged, it was not presented; and, on principle, it clearly cannot be requisite for a party who has been improperly dragged into a foreign Court, and against whom judgment has been obtained by fraud, to waste his time and his money in endeavouring to procure a reversal of the decree; and he ought to be allowed to obtain his remedy against the other party whenever they may happen to come within the jurisdiction of a Court of their own country.

A formal objection was made to the issuing of the writ, which it may be necessary to notice, namely, that if all the facts be true, there is no debt due to the plaintiff, he not having himself paid any money, and that the party entitled to sue is the agent at Macao. But I think there is nothing in the objection *qui solvit per alium solvit per se*, and the plaintiff who adopts one is bound to adopt the acts which he authorized his agent to perform; besides which, this is not a question as to a legal debt, or an arrest at common law, but as to the equitable claim of the

plaintiff to have Heerjeebhoy declared a trustee for the money he has received under a fraudulent judgment.

On the two grounds, therefore, of alleged want of jurisdiction and of fraud, I think the plaintiff has made out a *primâ facie* case for relief; and under the circumstances of the defendant in leaving the island immediately, the rule for granting the writ *ne exeat regno* must be made absolute.

No. VI.

IN THE GOODS OF JAMES STANT.

[*Cor.* SIR ERSKINE PERRY, J. in Chambers.]

19*th January* 1843.

Howard moved, on the affidavit and petition of a creditor residing at Deesa, that administration should be committed to the Ecclesiastical Registrar. The new Mutiny Act enacts that the Ecclesiastical Registrar shall not be entitled to take out administration in cases where, on a military man dying in camp and quarters, the surplus, after payment of regimental debts, is remitted to the Military Secretary at Bombay. The consequence is, that creditors, not knowing where to apply, frequently lose their money, the surplus being remitted home, after the expiration of twelve months, by the Military Secretary.

Before delivering the following judgment I showed it to SIR H. ROPER, C. J., who approved.

SIR ERSKINE PERRY, J.—This is an application, on the part of a creditor at Deesa, that administration may be granted to the Ecclesiastical Registrar, the deceased having died in camp and quarters, and the surplus of his effects, to the amount of upwards of Rs. 500, having been remitted to the Military Secretary at Bombay. The last Mutiny Act (3d and 4th Vict. c. 37. s. 52.) directs that the Military Secretary, on receipt of such surplus, is to pay the same to the executor, or legal representative (if in India), of the deceased; or if not in India, to remit it at the end of twelve months to the representative in Europe; and also enacts, that the Ecclesiastical Registrar shall not be required or entitled to take out administration in respect of such surplus.

In cases, therefore, where the surplus is thus remitted, and where

creditors exist, an obvious difficulty arises as to the mode of getting their debts paid, a difficulty, of course, much increased where they happen to reside at any distance from the Presidency; and almost insurmountable if, with the procrastination we are often accustomed to see in India, they allow twelve months to pass over their heads.

The Registrar obviously is not entitled to apply; a creditor absent from the Presidency, and living out of the ordinary jurisdiction of the Court, is certainly not a fit person to entrust the estate to; and I do not find any case in which such a party has been enabled to appoint an attorney to take out administration for him.

Under these circumstances I think the Court may exercise its discretion, by committing the administration to the Registrar, under Acts 39 and 40 Geo. III. c. 79. s. 21. and the clause in the Charter; just as the ordinary in England will grant it to some discreet person, though without interest, where legal representatives are not forthcoming. See *In the goods of Keane*, 1 Hagg. 692; and 3 Bac. Ab. 482.

No. VII.

IN THE MATTER OF THE WILL OF THUCKER CURRAMSEY SHAMJEE.

19th January 1843.

[Sir Erskine Perry, J. delivered judgment.]

In this case, the executors having exhibited an inventory, the next of kin, on an affidavit suggesting omissions, have called upon them to shew cause why they shall not file a further and better inventory.

It has been objected, on the part of the executors, that the next of kin, taking nothing under the will, have no interest to entitle them to raise objections to the inventory; and that although a suit is pending to set the will aside, the result of which might be to entitle the next of kin to the estate of the testator, still, in that case, the character of executor would be gone, in which character only they are under any obligation to furnish an inventory. But we disposed of this objection at the argument, on the ground that the next of kin had a possible interest in the effects of the testator, and that that was sufficient to induce the Court to entertain his application. The cases on the subject in the

books do not perhaps go quite so far as this decision, for they only decide that a contingent, or an equitable, or an apparent interest is sufficient, none of which, perhaps, can be said strictly to exist in the present case: but the principle laid down in the different cases fully, I think, bear out our decision; for it is this, that it is the duty of the executor to exhibit an inventory; that it is very beneficial to all who are, or who may be, interested, that he should do so; and that the Court, therefore, will lend its assistance to any one of the above classes to enforce its exhibition.

The second objection made in this case is more difficult to dispose of, and we accordingly took time to consider of it. It is contended, namely, that the Ecclesiastical Courts have no jurisdiction to entertain objections to an inventory, and that if they do so the Courts of Common Law will prohibit them; and the cases of *Catchside* v. *Ovington*, 3 Burr., 1922, *Henderson* v. *French*, 5 Mau. and Sel. 406, and *Griffiths* v. *Anthony*, 5 Ad. and Ell. 623, are undoubtedly strong to this point. On the other hand, it is alleged, that, notwithstanding these decisions, the Spiritual Courts still proceed to entertain objections to inventories; that the practice is very beneficial; and that we, sitting as a Spiritual Court, ought to follow their practice. It is clear, however, that this latter argument must be taken with some qualification; for if we, whilst sitting on the Ecclesiastical side, are bound by the practice of the Consistory Court in London; so also, whilst sitting as a Court of Common Law, we are at least equally strictly bound by the authority of the Court at Westminster. If, therefore, we follow the precedent set us by the Ecclesiastical Judges to-day,—for such is their practice,—we may to-morrow be called upon to put a stop to our proceedings, on the authority of the cases in the Court of Queen's Bench. To avoid this absurdity, therefore, we must lay down clearly to which set of authorities we give in our adhesion; and if, on looking into the question, we see reason to believe that the jurisdiction contended for does exist in the Ecclesiastical Court, we must be prepared distinctly to overrule the cases I have cited, and to which may be added, though not quite to the same point, *Bellamy* v. *Alden*, Noy. 78.

When the question is put in this naked form, and when it is recollected that the decisions we are called upon to disregard proceed from

such Judges as LORD HOLT, LORD MANSFIELD, and LORD ELLENBOROUGH, I confess that it has been with much difficulty I have been able to bring myself to consider the point as open to inquiry.

I have, however, carefully looked into the question; and on the amplest consideration I am capable of giving to it, I think that it is our duty to pronounce for the jurisdiction of the Ecclesiastical Court; and that, upon the same principle that the Ecclesiastical Judges have adopted, we ought not to regard the decisions of the Court of King's Bench as solemn adjudications of the point. If they were so, there can be no doubt that it is equally our duty, as it would have been that of SIR WILLIAM WYNNE and SIR JOHN NICHOLL, to pay deference to them: if they be not, I hope that it is not arrogating undue powers to ourselves when we adopt the practice, and feel ourselves governed by the arguments of those learned persons.

It is clear that, up to the case of *Griffiths* v. *Anthony*, 5 Ad. & Ell. 623, the Ecclesiastical Courts would have adopted the course which we are now following; for notwithstanding *Catchside* v. *Ovington*, 3 Burr. 1922, SIR WILLIAM WYNNE, in *Shackleton* v. *Lord Barrymore*, 2 Add. 329, cit., after mature deliberation, decided in favour of the jurisdiction; and although *Catchside* v. *Ovington* was followed up by *Henderson* v. *French*, 5 Mau. & Sel. 406, SIR JOHN NICHOLL equally disregarded the latter case, in his very powerful judgment of *Telford* v. *Morison*, 2 Add. 319. But it cannot be denied that the case of *Griffiths* v. *Anthony*, 5 Ad. & Ell., carries the Common Law authorities further than the two preceding decisions; for SIR JOHN NICHOLL expressly decides *Telford* v. *Morison*, on the ground that the Court of Queen's Bench had not fully disposed of the subject in *Henderson* v. *French*; whereas *Griffiths* v. *Anthony* was argued with a view of bringing *Henderson* v. *French* under consideration, and the contrary practice to it in the Ecclesiastical Courts was cited: notwithstanding which, however, the Court of Queen's Bench upheld *Henderson* v. *French*, and even went further than the preceding cases in ousting Ecclesiastical jurisdiction in such matters. For where, as LORD HOLT, in *Clinton* v. *Parker*, had held that it was competent to a legatee, though not to a creditor, to falsify an inventory in the Spiritual Court, LORD DENMAN denied such power to them both. It is to be observed, however, of *Griffiths* v. *Anthony*, the argument of which I perfectly well

remember, that the points which SIR JOHN NICHOLL remarked had never been brought to the notice of the Court, were not submitted to the Queen's Bench in that case. The counsel, who argued for the Ecclesiastical jurisdiction, contented himself with reading a passage from Mr. Williams's book, and did not seem to be acquainted with the case of *Telford* v. *Morison;* and the decision passed so quickly, and was thought so unsatisfactory, that I remember adding a note to my report of it in Nev. & Per. to cite *Telford* v. *Morison*, and in which I suggested that the Spiritual Courts might perhaps still persist in their practice, on the ground that the question of the ancient jurisdiction, independently of the Statute of Henry VIII. had not yet been solemnly discussed. It will be seen, also, that Mr. V. Williams, although the successful counsel in the case, is not altogether satisfied with the decision; for he observes on it, in the last editions of his work on Executors, that it is supportable on another ground, irrespective of the principle in *Henderson* v. *French*, although this special ground was certainly not mentioned in the judgment of the Court.

For these reasons, viz. because I am of opinion that it has never yet been brought to the consideration of the Courts of Common Law, that the jurisdiction of the Spiritual Court over inventories is long antecedent to the Statute of Henry VIII., because the jurisdiction of the latter, and the power to take oath in such matters, is expressly reserved to them by the Statute *articuli cleri* 1. 3. s. 2. Inst. 600.; and because, in the words of SIR JOHN NICHOLL, "it is of great convenience to creditors and legatees (for the same considerations apply to both) to obtain a *constat* of assets before they engage, here or elsewhere, in perhaps expensive litigations for the recovery of debts and legacies."—I think that the jurisdiction which has been exercised for some hundred years by the Spiritual Courts over inventories has not been put an end to; and that it is so useful a jurisdiction to suitors, under the peculiar circumstances of this country, as to induce us to be prone to support it as long as possible. I may add, that if we were to adopt a different conclusion, and were to consider the last decisions of the Queen's Bench *in rem*, we might present this anomaly, that after refusing to entertain such jurisdiction in the Spiritual Court, and so departing from the practice of the Courts in London, the question might come to be raised solemnly in the Courts at Westminster Hall, and then it is very probable that the powerful

reasoning of SIR JOHN NICHOLL might prevail. We should thus neither act in pursuance with what is the practice of the Court which deals specially with these matters in England, nor with what might ultimately turn out to be the law, when the question was solemnly raised in the Superior Courts. It is much better, therefore, to come to a conclusion which is on the safe side of offering benefit to suitors, and hindrance to fraud, and which appears to have all the preponderance of reason and convenience in its favour.

No. VIII
JUSSUFF BALLADINA
versus
HOLDERNESS.

20th June 1843.

[Judgment by SIR ERSKINE PERRY, J. delivered 20th June 1843.]

THIS action was brought to recover some advances which had been made to the defendant, as master of the ship Eleanor, previous to her sailing from this port to Calcutta, on a voyage for which she had been chartered by the plaintiff. The ship was burnt off Aleppee on her outward voyage.

Howard, for the plaintiff, contended that these advances were not made as payment of freight, and that the clause in the Charter-party merely referred to advances which were to be made at Calcutta after freight had been payable.

Dickenson, for the defendant, relied on the case of *De Silvale* v. *Kendall*, 4 Mau. & Sel. 37, and distinguished it from that of *Mansfield* v. *Maitland*, 4 Barn. & Ald. 582.

SIR ERSKINE PERRY, J.—By the Charter-party of freightment in this case, between the defendant, as master of the Eleanor, and the plaintiff, as merchant, the plaintiff hired the said ship for the voyage therein mentioned, that is to say, for an outward voyage from Bombay to Calcutta, and for a homeward voyage back to Bombay, on the usual terms. The following is the clause as to freight—

"And also that they, the said freighters, shall and will truly pay, &c., unto the said master, &c., three days after the said vessel shall have delivered her cargo at Calcutta, half of whatever amount shall be found, on calculation, to be due for freight, at the rate following, &c., and the

remaining half, three days after the delivery of the homeward cargo at Bombay."

Then followed several covenants introduced in behalf of the freighters; and lastly, the following covenant, on which the question in the present case mainly turns—

"And it is also covenanted and agreed by and between the said parties that the said freighters, their agents, correspondents, or assigns, shall and will advance to the said master, free of commission and interest, such sums as may be necessary for the ordinary disbursements of the said vessel, which amount is to be deducted from the amount that may be due for freight at the completion of the homeward voyage."

The plaintiff loaded a cargo on board of the Eleanor at Bombay, and it appears that he advanced to the defendant the sum of Rs. 3900 for (as it must be taken) the necessary disbursements of the ship; and the defendant gave the following receipt for it within the margin of one of the bills of lading for the delivery of cargo at Calcutta—

"Received from Jussuff Balladina Rs. 3900 on account of freight."

In the prosecution of her voyage the ship was destroyed by fire on the Malabar Coast; and the question now arises whether, on the above facts, the payment of Rs. 3900 is to be taken as a payment of freight in advance, according to stipulation, or merely as a loan, without interest, to be secured by freight in contingency of the ship's safe arrival.

The principle of law is fully assented to on either side, that the freighter generally is not liable for freight, unless the voyage be safely performed; and that unless he has bound himself by express agreement to pay freight in advance, any sum he may have paid as freight before the commencement of the voyage may be recovered back, if, through any disaster, the ship does not reach her port of destination. These two points are neatly put in Roccus De Nav. N. 80.

"*Naulum, seu vectura non debetur si locator navis propter amissam navim vel alium casum in eam contingentem, iter non fecerit, imò si solutum fuerit, repetitur.*"

And they are implicitly received in our law, see per LORD ELLENBOROUGH, C. J., in 1 Campb. 85, and per LORD ABINGER, C. J., in 8 Carr. and Pay. 393.

By attention to this principle we are enabled to clear the case of any

question that might otherwise arise on the form of the receipt on the bill of lading. The contract is the Charter-party: if in that instrument the freighter has bound himself to pay freight in advance, the advances cannot be received back: if he did not so bind himself, the advance was either a voluntary payment without consideration, which may be sued for as money had and received, or it was a payment according to the Charter-party, that is, a loan without interest.

The whole question, therefore, is, whether the freighter has so bound himself to pay freight, before the completion of the voyage, by way of advances; and I think that the true construction of the contract is, that he has not. The policy of the law, and the interests of the merchant, both require that freight should not be payable till the service to be rendered for it is performed. This maxim, of very old reception in the marine code, seems best fitted to secure faithful services, and to remove temptation to fraud from those persons entrusted with ships; and I do not think that there is any thing in the present state of society to shew that the reasoning on which the maxim is founded has become less operative. Parties, undoubtedly, by special contract, may subject themselves to what obligations they please, and may voluntarily throw aside the protection which the law could otherwise have afforded them.

But on every contract of such nature it appears to me that the true rule of construction is, the party who is alleged to have voluntarily given up certain rights shall not be taken to give up more than he has expressly stipulated for. The covenant in question was introduced for the benefit of the master: it was his duty to have the point made clear, as to whether the advances were to be made *qua* freight, if such were the intention. He has left this point ambiguous, *verba fortius accipientur contra proferentem*, and the policy of the law supplies the deficiency by construing the omission in favour of the freighter.

The decided cases which have recognized the payment of advances as payment of freight appear to bear out this construction entirely. In all of them it is said that the stipulation must be to pay advances as freight, *eo nomine*. Thus, in 2 Shower, *Anon.* 283, it is said, "advance money paid before, in part of freight, and named so in the Charter-party," is a good payment of freight. So in *De Silvale* v. *Kendall*, 4 Mau. & Sel. 37. Lord Ellenborough, after laying down the general principle, says,

"But if the parties have chosen to stipulate by express words, or by words not express, but sufficiently intelligible to that end, that a part of the freight (using the word 'freight') should be paid by anticipation, may they not so stipulate?" So also in *Saunders* v. *Drew*, 3 Barn. and Ald. 415, the freighter, after hiring the vessel at so much a ton per month, agreed to pay four months of such monthly hire in advance, hire and freight being of course interchangeable terms.

The principle which governs our construction of this Charter-party seems to me to be further confirmed by *Mansfield* v. *Maitland*, 4 Barn. and Ald. 582. For in that case, where the Charter-party, after expressing that freight was to be paid on delivery, half in cash and half in bills, contained a covenant that "the captain was to be supplied with cash for the ship's use," it would have been very easy for the Court to act upon the previous decision of *De Silvale* v. *Kendall*. The mercantile transaction was in both exactly the same: the shipowner, foreseeing that he might need advances for the ship's use, required a stipulation from the owner that he would make them. A very easy construction, therefore, would have enabled the Court to say that the advances in both instances were made as freight; that the mere circumstance of the clauses as to paying mere freight and advances being separate was immaterial; and that they must be construed together, according to the clear intention of the parties. But the Court refused to carry that case further, or to act on its analogy. ABBOT, C. J., said, "It is undoubtedly competent for the owner to make such a stipulation as that in *De Silvale* v. *Kendall*; but if he does so, it is his duty to take care that it is inserted in clear and explicit words in the Charter-party, that the money advanced shall be an advance in part payment of the freight."

The Court, therefore, refuse to extend the principle of the decision in *De Silvale* v. *Kendall* beyond its express terms. But the present case is confessedly an extension of that decision. The stipulation by the freighter is not nearly so clear and explicit, being unconnected with the clause as to payment of freight; and yet it is sought to be construed much more unfavourably for him than even that in *De Silvale* v. *Kendall*: for if these advances are to be construed as a payment of freight, they are not advances which the freighter could recoup on the first amount of freight becoming due. The advances are to be repaid out

of the homeward freight, but half of the entire freight is to be paid at Calcutta; and I feel no doubt that on this Charter-party the master could demand and retain, on receipt of it at Calcutta, the whole of such freight, irrespective of whatever advances had been made at Bombay.

But this very unfavourable construction of the right of the freighter undoubtedly demands most clear and unambiguous expressions to warrant it, and I confess I am quite unable to find them.

The case, indeed, would be entirely within the terms of *Mansfield* v. *Maitland*, if it were not that the clause as to advances contained a stipulation that no interest or commission should be allowed upon them; and this circumstance was undoubtedly much relied upon in *De Silvale* v. *Kendall*, to shew that the transaction was not a loan, but a payment of freight in advance. One may easily understand, however, why a freighter, in his desire to get his cargo despatched, should consent to advance money without interest; and this is all that the express terms of the covenant convey. Then the decided cases shew that when the freighter also binds himself to make the payment as freight, the stipulation must be express as to that provision also. I therefore think that the true construction of this Charter-party is, that the freighter has only stipulated to make advances, without interest, for the use of the ship, which, in case of the safe prosecution of the voyage, were not recoverable till the return to port of the vessel, but which, on her destruction, were recoverable absolutely.

Sir H. Roper agrees in the conclusion, but thinks the clause in the Charter-party had reference to advances to be made at Calcutta, and that the advance at Bombay was therefore not in pursuance of the Charter-party; but if not in pursuance of the Charter-party, it was an advance voluntarily made, and may be recovered back.

No. IX.

DHACKJEE DADAJEE

versus

THE EAST-INDIA COMPANY.

13th September 1843.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and taking away certain books, papers, &c. Plea, not guilty.

At the trial it appeared that the plaintiff was a merchant at Bombay, having formerly been engaged in the service of the *Guickwar;* and that in Dec. 1842 Captain Burrows, the superintendant of police, under a warrant from the Governor in Council of Bombay, entered the plaintiff's dwelling-house, and also his offices, in the Fort, and took possession of all his papers, documents, &c., and left the premises in the custody of a detachment of police. The premises remained four or five days in the possession of the police, during which time an examination of all the papers and documents was made. The production of the warrant was called for, but refused.

At the close of the plaintiff's case, *Le Messurier, A. G.*, with whom were *Howard* and *Dickinson,* moved for a nonsuit, on the ground that nothing was shewn to bring home the acts to the Home Government.

Cochrane and *Herrick, contra.*

Judgment of the Honourable the CHIEF JUSTICE.

This is an action of trespass against the East-India Company, and the defendants have pleaded the general issue.

The evidence consists of a statement of facts agreed upon by the counsel for the respective parties, and the testimony of two witnesses examined for the plaintiff. From such evidence it appears that in December last the Governor and Council of Bombay, assuming to act in their public capacity as Governor in Council, issued an order in writing to three stipendiary Magistrates of Police, jointly and severally, in pursuance of which one of the three Magistrates forcibly, that is to say, with all the force requisite to attain his object where there was no resistance, entered, and took possession of, and placed police sepoys at, the doors of two dwelling houses and a counting house of the plaintiff, searched the several houses for the plaintiff's books and papers, and having found them in the counting house, gave them in charge to

another of the Police Magistrates, Mr. Le Geyt, by whom, and by certain natives, the books and papers were scrutinized for five or six days, during which they and the counting house were held in the possession of Mr. Le Geyt.

By the 21st Geo. III. c. 70. s. 1. it is provided that the Governor-General and Council shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court at Calcutta for or by reason of any act or order, or any other matter or thing whatsoever, counselled, ordered, or done by them, in their public capacity only, and acting as Governor-General and Council. The like exemption from the jurisdiction of the Supreme Courts of Madras and Bombay is given to the Governors and Councils of Madras and Bombay respectively, by the 37th Geo. III. c. 142. s. 11., and the exemption is recited in the Charter of the Supreme Court of Bombay. Thus an action for the injury complained of could not have been maintained in this Court against the Governor and Council of Bombay. Redress is, therefore, sought by an action against the East-India Company; and as there has not been any consequential damage, and the injury was immediately occasioned by a wilful act,—wilful in the ordinary sense of that word, as importing design and intention,—the action is necessarily in trespass. The plaintiff could scarcely have brought an action upon the case against the East-India Company in respect of a trespass committed by the Governor in Council, without demonstrating that the East-India Company and the Governor in Council are not identical, or that, in committing the trespass, the Governor and Council did not act as the East-India Company. It would have become apparent that the Governor in Council has a representative capacity, and holds delegated authority. The Company and the Governor in Council would thus far have been presented to view as holding the same relative positions as principal and agent; and the admitted doctrine that a principal cannot be liable for the trespass of his agent, unless he has ordered the commission of the trespass, or, if done for his benefit, has subsequently recognized it, would have defeated the action. Avoiding this difficulty, the plaintiff brought his action in trespass; and it is maintained on his behalf, that the alleged trespass of the Governor in Council was the act of the Company; that the Company and Governor in

Council are one and identical; and that in committing the trespass the Governor in Council acted as the Company. In support of this position the judgment of MR. JUSTICE RYAN in the *Bank of Bengal* v. *The United Company*, Bignell, 180, has been relied on. I think the expressions of MR. JUSTICE RYAN in that case were confined to the subject matter; indeed, the words, "I say that the Governor-General in Council does act here as the United Company," import as much; and SIR EDWARD RYAN does not any further impugn the judgment of SIR CHARLES GREY in the same case, wherein he repeatedly speaks of the Company and the Governor-General in Council as holding relative positions as principals and agents: see especially Bignell, 128, 129. 142, 143. SIR EDWARD RYAN intended to rebut the position of SIR CHARLES GREY, that the making a genuine Government promissory note by the Governor-General in Council was strictly analogous to the case where a note is made, or bill accepted by procuration; that therefore Oxborough's admission of the forged note was not like an admission by an agent of the principal or person who made the note, but was merely like an admission by an agent of the person who had been authorized to make the note by procuration, to which procuration it could not be competent to constitute an agent to verify his handwriting, so as to bind, not himself, but his principal. Accordingly, SIR EDWARD RYAN denied that proposition, and added, "I say that the Governor-General in Council does act here as the United Company, and this is not to be considered as a recognition by an agent of an agent, but as an act of the United Company themselves." It must be borne in mind that SIR EDWARD RYAN spoke of assumed valid acts of the Governor-General in Council, to which office implied power to make Government promissory notes, and to appoint agents to authenticate them, is given, as necessary to the due execution of the office, and as exercised by former Governors-General in Council. MR. JUSTICE RYAN says, "If the Governor-General has the authority to authenticate the notes, he must have agents to act for him in all ways." And MR. JUSTICE RYAN had previously shewn, or argued, that authority to appoint Mr. Oxborough as agent to authenticate notes had been legally given by the Governor-General in Council, in the manner in which authority to make similar appointments was formerly given. He therefore main-

tained that the immediate consequence of those legal acts of the Governor-General in Council affected and was binding on the East-India Company, no extravagant position, inasmuch as the power to govern delegated by the Crown and legislature to the Company, had been delegated by the Company to the Governor-General in Council, by whom it had been exercised in the subject matter, as MR. JUSTICE RYAN maintained, legally, and within its proper scope; and therefore a stranger, who, relying on the legal appointment of the agent, had taken a forged note because the agent admitted it to be genuine, might well contend that the Company was bound by the agent's admission, as much as if the admission had been made by the Company; and that the Governor-General in Council, in authorizing the appointment of the agent, had acted legally, and within the scope of their authority; and that the effect was the same as if the agent had been immediately appointed by the Company.

In like manner it might be conceded, that, in doing all legal acts, the Governor of Bombay in Council acts as the East-India Company, whom the consequences of such acts would bind and affect as much as if the act had been done immediately by the Company. But no benefit could result from the concession, because the phrase "legal acts" imports acts done in strict conformity with the power to govern delegated by the Crown and legislature to the East-India Company, and by the Company delegated to the Governor in Council: more than that the Company could not legally delegate; further than that the Governor in Council could not legally go. But should the Governor in Council go further, and commit an act for which an individual might claim damages in case, or trespass, or otherwise, such an act would be illegal, or damages could not be recovered for it. If it be said that for such an act the East-India Company is liable, without regard to the scope of the political authority delegated by them, or without shewing that they authorized or ordered the act, or recognized it as done for their benefit, I utterly deny the position, and say it is inconsistent with law, and that there is no precedent to support it. You cannot do justice in such circumstances without taking into consideration that the Governor in Council has a representative capacity, and holds delegated authority. The allegation of the counsel for the defendants, that the

Company and the Governor and Council are in the relative positions of principals and agents, has been denied and combated, because, if established, it would nearly at once dispose of this action; but SIR CHARLES GREY, as already observed, in his judgment in the *Bank of Bengal* v. *The United Company*, frequently speaks of the Company and the Calcutta Government as holding those relations; and I have endeavoured to shew that MR. JUSTICE RYAN does not impugn the general propositions so laid down by SIR CHARLES GREY. That the acts of the Bombay Government, assuming to act in their public capacity, were necessarily binding on the Company, is clearly denied by the judgments of SIR EDWARD WEST in *Amerchund Bedreechund* v. *The East-India Company and others*,[1] as shewn by the *Advocate-General*; and the decision of the Court of Calcutta in the *Bank of Bengal* v. *The East-India Company* was confirmed on appeal, 2 Knapp, 245, because the Company was not bound by the authority to appoint Oxborough as an agent, which had been given by the Governor-General in Council. It is sufficient for my purposes to say, that, as an agent, in the strict sense of the term, and the Governor in Council, have each a representative capacity, and act each by delegated authority, what is predicated of the one must frequently be predicable of the other, and arguments regarding the one must often be applicable to the other, especially so far as the extent of their authority and the scope of their respective powers is concerned.

The facts agreed upon by the counsel for the respective parties to this action, and some of the positions contended for by the *Advocate-General*, have been expressed in terms which seemingly imply that authority is claimed for the Governor and Council by virtue of their office, and especially under the 37th Geo. III. c. 142. s. 2., to set aside the ordinary rules of law and rights of individuals, when the doing so shall, in their opinion, be conducive to important designs of Government; and that in such instances the discretion of the Governor in Council becomes the rule of action. If this doctrine be not contended for, why lay such stress upon the "acting under, and in execution of, an order in writing of the Governor in Council, issued for reasons

[1] See *ante*, p. 266, for the judgment in this case, and the note at the foot of the page.

deeply affecting the interest of the British Government?" and why make use of such arguments as the counsel for the defendants have employed? If such a doctrine be set up, let some authority for it be referred to. I am ignorant of any by which it can be supported. Governors and Councils have not, by virtue of their appointments, the sovereign authority delegated to them; and acts on their own authority, unauthorized by their commissions, or by statutes, or expressly or impliedly by instructions, are not equivalent to such acts being done by the Crown, and are invalid. They are officers having a limited authority; and such acts as those complained of in this instance would not have been valid if done by the Crown itself, for this is not held as a conquered country. The law of England is here established; and with that law, as here established, the acts in question are *primâ facie* and obviously at variance, to avail myself of the reasoning of MR. BARON PARKE in *Cameron* v. *Kyte*, 3 Knapp, 332. Let the Governor and Council be officers only, with limited powers, not expressly including such acts as those in question; are such acts authorized by implication? Implied powers may be given to an office, either because they are necessary to its due execution, or because they are such as have usually been exercised by those who have borne the office. It is clear that a power to infringe the law—I do not say to alter, because absolute infringement, not mere alteration or suspension of law, is here in question—it is clear that a power to infringe the law by which this Presidency has been usually governed is not necessary to the due discharge of the office of Governor in Council; and it is equally clear we have had no evidence, nor any information, of any similar power having ever been exercised by previous Governors and Councils. In confirmation of these doctrines I would refer to the judgment in *Hill* v. *Bigge and Rundell*, on appeal; but more especially to *Cameron* v. *Kyte*, 3 Knapp, 332. See also the judgment of SIR CHARLES GREY in the *Bank of Bengal* v. *The United Company*, Bignell, 119, 120, 121. The 37th Geo. III. c. 142. s. 11. provides that this Court shall not have jurisdiction as against the Governor and Council for any act done by them in their public capacity; and as a Justice of the Peace is entitled to notice of action where he intended to act as Magistrate, but exceeded his authority, so it may be conceded that the Governor and Council are within the protection of this Statute; although, as there

has been a want of authority, rather than a mere excess of authority on their part, it might be contended the subject matter was, in a manner, beyond their jurisdiction. But the Statute does not exclude jurisdiction against the East-India Company for a trespass actually brought home to them, or make that right which would otherwise be wrong, although the Governor and Council be not liable to the jurisdiction of this Court in such a matter. Proceedings might have been taken under the 3d, 4th, and 5th Sections of the 21st Geo. III. c. 70., and they are amenable to the Queen's Bench, from the authority of which Court a bill of indemnity would be their only shelter. Great inconveniences might arise were Governors-General, Governors, and Councils, to be subject to the Local Courts for acts done in their public capacities; especially as, owing to the distance from England, there might not be time to obviate evils by bills of indemnity. So far, but so far only, are Governors-General, Governors, and Councils, protected by the Statutes in question; which do not in themselves legalize any act otherwise illegal, or confer the slightest additional discretionary power upon the Governor-General or Governors in Council of our Indian possessions. When, therefore, those high officers, in their public capacity, infringe the ordinary rules of law, or rights of individuals, it concerns them that the circumstances be such as either may fairly warrant them in expecting to be protected by means of bills of indemnity, or may render it certain that the penalties or damages incurred will be but trifling. In the present day a shrinking from responsibility has so often been the subject of animadversion, that a public officer may be led into the opposite extreme, and may court responsibility as affording opportunity either for avoiding censure or obtaining meritorious distinction.

I have made these observations because the terms in which the statement agreed upon by counsel has been couched, and the positions put forth, but not much relied on by the *Advocate-General*, seemingly implied opinions in which I am unable to concur. The questions for this Court to determine are, whether a trespass has been committed; and, if so, whether the East-India Company can be held liable for that trespass: if these questions should be determined in the affirmative, we should have to consider the amount of damages to be awarded; and to enable us to assess them we have merely before us the

case as agreed upon by the counsel, and that meagre evidence which has been given by the two Police Magistrates. But other circumstances might, or must, be most important as regards the damages. We should have been permitted to perceive whether any emergency had existed, rendering it incumbent on the Governor in Council to adopt these extraordinary measures, to the end that the State might receive no detriment; not merely to the end that the State might benefit, for I cannot bring myself to think that such an end could justify the means or acts alluded to in the case as at present before us; but to the end that the State might escape impending danger, or detriment perilous thereto. In *Fabrigas* v. *Mostyn*, 1 Cowper, 173, LORD MANSFIELD thus expresses himself: "I can conceive cases in time of war in which a Governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege, or upon an invasion of Minorca, the Governor should judge it proper to send an hundred of the inhabitants out of the island from motives of real and genuine expediency; or suppose, upon a general suspicion, he should take people up as spies, upon proper circumstances laid before the Court it would be very fit to see whether he had acted as the Governor of a garrison ought, according to the circumstances of the case."

In order to a just assessment of damages, the conduct of the plaintiff would also be most important, for he may have forfeited any claim to more than nominal damages; and although there should now be a verdict for the defendants, yet, upon appeal, the case may be sent back to us for an assessment of damages. Were all the circumstances fully laid before the Court the injury might appear less aggravated than at present; and, on the other hand, in eliciting the facts, matter might have been shewn fairly raising an inference that the East-India Company had given the authority contended for. The transaction may at present be laid before us in a manner unfavourable both to the plaintiff and the Government of Bombay; to the Government, as representing the wrong of a more aggravated character than it really was; to the plaintiff, as increasing the difficulty in inferring an authority from the East-India Company. Upon the case, however, as brought before us by agreement of the parties, the conclusion is forced upon us, not

merely that a trespass has been committed, but that such trespass was of a grievous character. The proceedings of the Governor and Council, and of the Stipendiary Police Magistrate acting by their orders, are sufficiently apparent to render their illegality unquestionable; and that the acts admitted in the case were trespasses of a serious nature, must be obvious on referring to LORD CAMDEN'S Judgment in *Entick* v. *Carrington and others*, 2 Wils. 275. The Counsel for the plaintiff has confined himself to reading the more declamatory part of that judgment; but there are important doctrines, equally applicable on the occasion, to be found in the following passages. (HIS LORDSHIP here quoted and commented on the passages he alluded to.)

Upon such authority, although confident, from what is privately within my knowledge, that the Governor in Council was actuated by amiable motives and intentions, I cannot but conclude that the acts complained of and admitted were grievous trespasses, because, upon the case as presented to us, there is no apparent precedent matter to palliate, still less to justify: and if the proceeding were to be judged of by the result, so far as this Court is informed, it would seem to have been utterly unprofitable. It has not been shewn that the acts were done to avert peril from the State, or that the plaintiff, by his conduct, had forfeited any claim to redress; and our judgment should not be affected by the expression "deeply affecting the interests of the British Government," upon which expression, as being in the warrant, the counsel for the defendants have so much relied; for that only expresses the opinion of the Governor in Council: the facts upon which it is founded are not set forth, and it is couched in vague indefinite terms; and for these reasons it cannot greatly influence the Court.

I now come to the question, Can the East-India Company be held responsible for these acts of the Governor in Council? Upon this branch of the subject the first point raised was, whether a corporation can or cannot commit a trespass. On the one hand, the counsel for the plaintiff refers to several Statutes which contemplated actions of trespass against the East-India Company, and cases in conformity therewith. On the other hand, it has been contended that such Statutes and cases were prior to the 3d and 4th William IV. c. 85., which abolished the trading capacity of the Company, and rendered the objects

and duties of the Company merely political, and having reference to the government of this country; that, therefore, trespass is not now maintainable, especially as, should there be a verdict against the East-India Company, there would be no property whereon to issue execution, their funds and revenues being all appropriated to other purposes. In support of this last argument the judgment of SIR CHARLES GREY in the *Bank of Bengal* v. *The East-India Company*, Bignell, 127, has been referred to. I am not certain that a Court of Law should refuse to give a judgment because a writ of *fieri facias* could not properly, that is to say, effectually, issue thereupon. No such objection was raised in the case of the Victoria Park Company, either in the first instances, or when the application was made for a *mandamus;* and in refusing to grant the *mandamus* the Court of Queen's Bench in no degree impugned the original judgment, or questioned its validity. From Bignell, 127, 137, and 175, it seems that SIR CHARLES GREY doubted whether the East-India Company were liable, as principals, to pay, of their own property, genuine promissory notes made by the Governor-General in Council; and, consequently, whether such notes could affect the property of the Company, as distinguished from the territorial revenue upon which those notes were a charge. Although an action might be upon a genuine note, to the payment of the interest on which specific funds were appropriated, he yet seems to have held that no action would be on a forged note, to the payment of which no funds were appropriated, although the Company, by their agents, might have admitted such note to be genuine; for the public revenue could not be affected by writs of execution, which could only issue against the peculiar property of the Company, not held in trust for the Crown, or for the purposes of Government; to wit, such property as ships and other commercial assets. It has thence been argued on behalf of the defendants, under the 3d and 4th William IV. c. 85., that commercial assets, and all other property than what is retained for the purposes of Government, has ceased to belong to the Company, and that there is no longer any property of the Company upon which a writ of execution could operate. The discussion of the arguments of counsel on these points is immaterial to me, considering my view of other branches of the case; and I shall not stop to inquire how far such

arguments are affected by the 3d and 4th William IV. c. 85. sec. 9, 10. and 17. The last-mentioned Section, after giving priority to the payment of the dividends, and the two millions security fund, appropriates the rest of the revenue to the service of the Government, and to the payment of charges created, confirmed, and directed, by the Statute, in such order as the Court of Directors, under the Board of Controul, shall direct. If the East-India Company should have a verdict against them for a trespass, relating to the Government of the country, these 9th, 10th, and 17th Sections might be worked upon so as to ensure payment of the damages awarded; and it may be going too far to say that all property not retained for Government purposes has been already disposed of, especially as Dapoorie and Malabar Point are retained.

I have myself no doubt that an action of trespass will lie against a corporation, and especially against the East-India Company, if, assuming to act in their political capacity, they commit a trespass by having ordered it, or by recognizing it when done for their benefit, as much as trespass would lie against the Governor of a colony, who, assuming to act in his political capacity, should commit a trespass. That a Governor is thus liable must be obvious from *Fabrigas* v. *Mostyn*, *Dutton* v. *Howell*, *Cameron* v. *Kyte*, and several other cases. The East-India Company, in their political capacity, are, like a Governor, representative, and exercise delegated authority; and that a recognition by a man of trespass done to his use is evidence of his being a trespasser, is shewn by 4th Inst. 317, and *Wilson* v. *Barker and another*, 4 Ad. and Ell. 615, perhaps as affording an inference that he had commanded it. That trespass will lie against a corporation is established by many cases; *Maund* v. *The Monmouthshire Canal Company*, 1 Carr. and Marsh. 606, in which TINDAL, C. J., said there was no distinction, so far as this point was concerned, between trespass and trover. Now the case of *Amerchund Bedreechund* v. *The East-India Company and others*, 1 Knapp, 316, was a case of trover; and though the judgment was reversed on appeal, it was so because the act had been done, if not *flagrante bello*, yet *nondum cessante bello*; and the verdict for the East-India Company in the Court below was not upon the ground that trover would not lie against the East-India Company, but because, in conversion, or assent to, or recognition of, the acts of

the Government of Bombay had been proved against the Company: the following cases also, *Yarborough* v. *The Bank of England*, 16 East, 6, and *The Queen* v. *The Birmingham and Gloucester Railway Company, Duncan and others* v. *The Proprietors of the Surrey Canal*, 3 Starkie, 50, and *Smith* v. *The Birmingham Gas Company*, 1 Ad. and Ell. 526, 3 Nev. and M. 771, all go to establish the point. There is likewise a case much relied upon by *Mr. Cochrane*, *Gopeemohun Deb* v. *The East-India Company*, in which the full bench at Calcutta is reported to have held, when dismissing a bill in equity, that an action of trespass might have been maintained against the East-India Company for having ordered or recognized the seizure of the complainant's ground by the Governor-General in Council, for the purpose of converting it into a public road along the banks of the Hoogly, an act obviously done by the Governor-General and Council in their public and political capacity; and thus the case seems to establish important branches of *Mr. Cochrane's* argument; first, that trespass lies against a corporation; and secondly, that it lies against the East-India Company for acts done in their public or political capacity by a Governor-General, or Governor and Council. There was, however, a previous order, or subsequent recognition, of the act. I have not seen the report of the case, which I understand is to be found in a Calcutta newspaper.

As, in my opinion, there is no pretence for saying the Governor in Council had authority, either express or implied, from the East-India Company to commit these acts, or any acts of the description, it is scarcely necessary I should discuss whether, in order to render the Company liable for the acts, such alleged authority, if expressly to commit acts of the description, should have been under seal; or whether, if the alleged authority was not express as to the acts, the Governor and Council, committing the acts in the exercise of implied authority, should have been appointed under seal. We have had no evidence whether the Governor and Council are appointed under seal otherwise; but it has been shewn that such authority cannot be implied, either as necessary to the due execution of the office of Governor in Council, or as usually exercised by those who have acted as Governors in Council; and the incontrovertible negation of the latter branch of the proposition almost sufficiently rebuts the former. Still, if it were established that

such implied authority was given to the office, I should hold that the Governor and Council, of the validity of whose appointments I have no doubt, whether appointed under seal or not, might exercise the power, and bind the Company. But if such implied authority were given, acts in strict conformity therewith would be legal, and could not render the Company or Governor and Council liable to pay damages; for the power to govern possessed by the East-India Company is, in all respects, legal, being delegated to them by the Crown and legislature. The like power, and no more, do they delegate by the appointment or commission of the Governor and Council; at least we must presume that they delegate no more. Whatever is done within the prescribed or implied limits must be legal, and liability to pay damages cannot accrue from it; but if the Governor in Council should exceed and act tortiously, the tortious act might or might not affect the Company: I will not say bind the Company, because the act could only bind the Company in one sense, that is to say, bind them to pay damages; but certainly the act could not bind the Company in the sense contended for in behalf of the plaintiff, namely, bind them as an act done by the Company themselves, unless, indeed, the Company had expressly ordered it or recognized it. A principal is not bound by that tortious act of his agent, as by an act he has himself committed, unless, by having ordered or adopted it, he can be considered as having, in fact, committed it. If he has thus, in effect, committed it, though the tort were a trespass, an action of trespass would lie against him. If he has not thus in effect committed it, he is not liable at all if the tort was a trespass; and if the tort was less than a trespass, and not in effect committed by the principal, he would indeed be liable to an action on the case, if the act were within the scope of the agent's employment; but he would not be thus liable as for an act done by himself: his liability would arise from his having chosen an improper agent. Whether the Company could be affected by a tortious act of the Governor and Council, and if so, in what manner and to what extent, must, in my opinion, be determined on similar principles.

So much for the alleged implied authority, to the exercise of which, so as to affect the Company, I should think it unnecessary that the Governor and Council should be appointed under seal. On the other

hand, if an express authority were set up (and nothing of the kind is even alleged), I should incline to think that such express authority ought to be under seal. The case would somewhat resemble that of *Horne* v. *Ivy*, 1 Mod. Reports, 18, for the service to be done would certainly be extraordinary; and see the report of the same case in Keble and Ventris, and in 1 Siderfin, 441. Although an old case, it seems to have been recognized by LITTLEDALE, J., in *Smith* v. *The Birmingham Gas Company*, 1 Ad. and Ell. 526, 3 Nev. and M. 771; *Gibson* v. *The East-India Company*, 5 Bingham's new Cases, 262; *Arnold* v. *The Corporation of Poole*, Vol. 21 Law Journal, Part 5. 29th April 1842; and *The Mayor of Ludlow* v. *Charlton*, 6 Meeson and Welsby, 815; all cases, indeed, with respect to matters of contract, also tending to shew that such an authority should be under seal. But, as already observed, no express authority is even alleged. If any implied authority were shewn, I should think it valid, for the reasons already given, though the Governor and Council had not been appointed under seal. We have no evidence how they were appointed, but must assume them to have been legally appointed, so as to be competent to exercise all powers implied as necessary to the due execution of their office; and, as already observed, I am convinced that to the due execution of that office no description of power, like that assumed in the present instance, was at all essential; and therefore, and as no such power had previously been claimed or exercised by Governors in Council, I hold that no such power is implied.

But it is contended, to use the words of the plaintiff's counsel, that "the alleged trespasses flowed from the implied authority which must attend upon every Government;" and that as the Government of India is in the East-India Company, they must be held liable for these trespasses, as for acts done in governing the country. That the Government of India is in the Company, although denied by their counsel, is, I think, established by the 1st Sec. of 3d and 4th Will. IV. c. 85., which contains express declarations to that effect; and the proposition is not less true in law, because their power to govern is greatly restricted, however the restriction might render it unjust to hold the Company liable for tortious acts of a Governor and Council, whom they had not unlimited power either to appoint or remove. But it has

been contended that the Company have been already held accountable for trespass, as for acts done in governing the country. In support of this, *Gopeymohun Deb* v. *The East-India Company* was referred to, but there the seizure of the land by the Governor-General in Council, for the use of the Company, had been recognized by the Company; and in *Skinner* v. *The East-India Company*, cited in Cowp. 180., there appears to have been a similar recognition or adoption of the act, as done to exclude interlopers: and in all the cases in which corporations have been held liable in trespass for acts done by their servants, it appears to me that the circumstances import a recognition or adoption of the acts, as done to the use of the corporations.

It has been further argued, that the trespasses followed from the authority vested in the Governor in Council, because the 59th Sec. of 3d and 4th Will. IV. c. 85. provides that "no Governor, or Governor in Council, shall have the power of making or suspending any regulations or laws in any case whatever, unless in cases of urgent necessity," &c. &c.; thereby giving implied power to make or suspend laws. In cases of urgent necessity, such a power may necessarily be given, expressly or by implication; but it has no reference to the acts before this Court; for the Governor in Council had not made any law warranting a forcible entry into the houses of the plaintiff, and a search for, and seizure of, his papers; neither had the Governor in Council suspended the law by which such proceedings were prohibited. We cannot easily imagine legislation for such purposes; and to give validity to any law so made by the Governor in Council, and affecting the good order or civil government of the town and island of Bombay, registration in this Court would still perhaps be requisite. A power to suspend or make laws upon emergency may be necessarily given to the Governor in Council. A power to infringe existing law has not been given, and seems unnecessary; and, as already observed, should only be assumed under circumstances which justify expectations of indemnity through an act of the Legislature.

How is it then made out that the proceedings in question flowed from the authority which must attend on every Government? It is admitted there is no express authority for them; and if so, the alleged authority, if it exist at all, must be implied from the nature of the office

of Governor in Council. I betake myself to the words of Mr. BARON PARKE's Judgment in *Cameron* v. *Kyte*, 3 Knapp, 343, 344, 345, 346.

Such authority I conceive to be conclusive. The Governor in Council has not the sovereign authority. His authority is carefully restricted by Acts of Parliament and otherwise, and such proceedings as those in question here would have been invalid if done by the Crown itself; for this is not held as a conquered country, under the law of England as here established. In *Fabrigas* v. *Mostyn* despotic authority was claimed for General Mostyn; and that he had possessed most ample discretionary power appears to have been conceded by the Court. It seems, therefore, that he had possessed authority, and had exceeded and abused it, rather than that he had acted without any authority whatever. In the former case, the Court, on consideration of all the circumstances, might have determined whether his discretionary power had been discreetly exercised, and might have declared him guilty or not guilty accordingly; and with this view the expressions in LORD MANSFIELD's judgment, already quoted, are consistent: see, also, *Sir Richard Dutton* v. *Howell and others*, Shower's Parl. Cases, 31; *Cameron* v. *Kyte*, 3 Knapp 332; and *Hall* v. *Campbell*, Cowp. 204. On the other hand, had General Mostyn acted without any authority whatever, however great the emergency had been, however discreet his conduct, however amiable his motives and intentions, still a trespass would have been committed; and although the damages might have been but nominal, there must have been a verdict against him, unless a bill of indemnity had passed for his relief.

The mere fact that no former Governor in Council assumed or exercised the power in this case contended for, in my mind, almost sufficiently shews that no such implied power is given to the office. If such implied power were given, and the proceedings in question had been in strict conformity therewith, without tort or excess, they would be legal, and no claim to damages would accrue; but if there had been indiscretion, tort, or excess, in the proceeding, still I should think, for reasons already given, that the East-India Company could not be liable to an action of trespass, unless they had ordered or adopted the trespass.

But, as a last resource, it has been contended, that, from the lapse of time, we should conclude that the Company have been informed of

these proceedings, have acquiesced in or adopted them, and are therefore liable. To refute this position, I shall again refer to Mr. BARON PARKE's judgment in *Cameron* v. *Kyte*, 3 Knapp, 332. If recognition is to be inferred from acquiescence, who shall say when that operated, or who can assign any certain time at which the act was recognized? Something was said about a memorial from the plaintiff to the defendants, but no evidence was given regarding it. If it existed, the ship conveying it may have been wrecked, and the memorial may have perished with it. We have no evidence whether any memorial was sent at all, or when, or whether the Company have been duly informed of the matter. The Governor and Council, or the Secretaries, might have been asked to give evidence on the subject; and, as the counsel for the Company observed, the Company may have repudiated the proceedings, and may be doing their utmost to redress the plaintiff.

I believe I have not omitted to take notice of any point that has been raised; and on the whole there is no doubt upon my mind that the verdict should be for the defendants.

Judgment of the Honourable MR. JUSTICE PERRY, pronounced on the 13th day of September 1843.

This is an action of trespass against the Honourable the East-India Company, for a series of illegal acts committed against the plaintiff and his property, by the orders of the local Government of Bombay. The trespasses in question have not been attempted to be justified or palliated, and are undoubtedly of a nature to call for heavy damages, if the action can be sustained. The form of procedure adopted is somewhat novel; for I cannot find a single instance, during the 240 years' existence of the Company as a Corporation (and I asked the question particularly at the Bar), of an action having been brought against the Company for the illegal acts of the Governors and members of Council.

The legal mind is necessarily, therefore, on the alert, so as to avoid being led astray from the safe and ancient tracks of law.

The novelty of the form of action, however, must not deter the Court from exercising its legal jurisdiction, if it shall be found to consist with the true principles of law applicable to corporations in general, and to the Statutes passed in special reference to the East-India Company.

And indeed, to any one who observed the decorous and abstract mode in which this case was treated at the Bar,—so abstract, indeed, as to names, dates, and facts, that the Court could hardly get possession of sufficient materials for its judgment,—it must occur that this mode of seeking redress from nominal defendants presents certain not inconsiderable advantages, in its avoidance of those asperities which actions against persons, especially against the high functionaries of Government, are pretty sure to call forth.

As the plaintiff, to sustain his present action, must base his claim on the legal theory which enables him to substitute other parties to the actual *tort feasors*, as the defendants civilly responsible, it seems desirable to state a few of the leading principles applicable to corporations from which this relation arises.

It is indisputable, then, that a corporation aggregate is just as much civilly responsible for every damage which may be caused through its corporate agency, as any private individual. This responsibility always did exist, as it would seem, at Common Law; though in the case of trespasses, from the form of process necessary in early times to bring defendants into Court, a difficulty arose, which, though frequently got over, as appears by the earliest books, gave rise to the erroneous notion that an action of tort would not lie against a corporation. That error has been completely removed by recent decisions in England, and now it is quite manifest that redress can be obtained against a corporation, both by civil and criminal process, for every injury which can be repaired by pecuniary charges upon them.

But as a corporation aggregate is a mere entity of law, composed, it is true, of individuals, but incompetent to act physically on any occasion, a mode has been devised by the law for enabling the corporate will to be expressed on every occasion.

This mode is by the use of a common seal, which, on being attached to any order expressing the will of the majority of the ruling body, gives validity to its acts, binds the corporate property, and binds also, to a certain extent, every individual corporator, whether he may have assented to the order or not.

But as there are certain trivial and ordinary acts which every corporation must have to discharge, and which would constantly go unper-

formed, if an order under the common seal were required on each emergency, an exception has been made, from the earliest times, as to the necessity of attaching such seal to the orders in question. The most familiar instance on this head is that of the appointment of a bailiff to distrain for rent, which it was long ago held might be made by parol. *Cary* v. *Mathews*, 1 Salk. 191. The principle of this decision has been extended in latter times to all such duties as are thrown upon corporations, whether by Charter or Act of Parliament, and which are of such constant occurrence, or of such immediate urgency, as to render the object of incorporation wholly nugatory, if the ceremony of the common seal were required on each occasion. "This principle,' in the words of LORD DENMAN, adopted and confirmed by the recent decision of the Court of Exchequer, *Mayor of Ludlow* v. *Charlton*, 6 Mee. & Wel. 822, "appears to be convenience, amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed;" and on this principle the East-India Company was made liable for the bills drawn upon it in India, by parties duly authorised by parol, but who were not invested with the common seal of the Company. *Murray* v. *The East-India Company*, 5 Bar. & Ald. 204.

On these grounds, then, the plaintiff launches his case; and he contends, that as the last Charter Act, 3d & 4th Will. IV. c. 85, has vested, or rather continued the Government of India in the Company, with its power of nomination to the different offices at the several Presidencies, the acts of such officers in India, in the necessary conduct of Government, are the acts of the Company itself; that they are, moreover, acts of such daily and immediate urgency as to dispense with the necessity of any order under seal; and therefore if any act of local Government be shewn illegal in its character, but within the scope of the authority necessarily committed to a distant agent, the Company, as a body corporate, is responsible in damages.

It seems to me, that, on the principles of corporation law, these positions are perfectly well founded, and that they have not met with any sufficient answer at the bar; for if it be conceded that the members of the local Government are corporate officers, if they are placed here to

carry on the Government vested in the Company, it seems preposterous to suppose that any special authority for the daily and necessary acts of a Government can be required; and therefore all argument as to the necessity of an order under seal falls to the ground. The plaintiff contends, that, as a corporation cannot act by itself, the Government is carried on by agents here, in the only mode in which a corporation can conduct a Government at a distance: that therefore the executive Government on the spot is the corporation. In the words of SIR E. RYAN, "the Governor-General in Council does act here as the United Company; and this is not to be considered as a recognition by an agent of an agent, but an act of the United Company themselves." Bignell 180.

The counsel of the defendants meet these positions with several arguments, the untenableness of which, as it appears to me, convinced me that the positions of Mr. *Cochrane* on his hypothesis are sound. First, it is alleged that the basis of the plaintiff's argument rests on the assumption that the local Government here and the Company are identical: it is then shewn that the local Government is one of very limited powers, amenable to orders from Calcutta, to orders from the Court of Directors and Board of Controul, to orders and interference from the Imperial Legislature of Great Britain; and it is therefore contended that the whole foundation of the argument is destroyed. But this appears to me fallacious. A bailiff, duly appointed to act for a corporation, undoubtedly makes the corporation responsible, and his acts are *pro tanto* the acts of the corporation itself, and may be so alleged in pleading; yet no one will contend, that because the bailiff had certain limited powers, his acts to that extent, and within the scope of the authority, are not the acts of the corporation.

The argument, therefore, on this point being felt to be somewhat clinching against the defendants, great struggle is made to shew, secondly, that the acts which form the subject matter of the present action were in nowise within the scope of the authority committed to the local Government of Bombay. It is alleged by the defendant's counsel that the acts were wholly unauthorised, unjustifiable, and, if not malicious, wilful on the part of the Governor-in-Council; and that the Company ought to be no more made responsible than if the same parties had sent so many coolies to plunder the house of a native or English banker for their

own purposes. I can by no means acquiesce in the position which seeks to place the immediate actors in this transaction in such an unfavourable light. For although I do not think it is competent to this Court to make any distinction in its presumptions, with reference only to the high station and importance of the parties who may be brought before it; and although, in common justice to the plaintiff, it must be assumed on this occasion that no just cause existed for the forcible interference with his house and papers; still I do not conceive that the Court, or any one, is warranted, on the facts of this case, in imputing to the members of the Government any thing beyond an indiscreet exercise of the powers committed to them. Several cases may be suggested in which the acts in question would be perfectly justifiable: others may be supposed, where suspicions ran so high as to the safety of the State being in danger, that the award of very moderate damages would suffice for any infraction of law. And though the Court is not at liberty to suppose that either of these two species of cases had taken place on the present occasion, the utmost which I think can be fairly inferred against the Government is, the having acted, perhaps, with over zeal or easy credulity to some untrustworthy information or lengthy letter from Capree, but with no shade or blame whatever beyond such imputation. Indeed, the plaintiff himself scarcely represents the impropriety of conduct displayed by them so strongly as I have now put it. I think undoubtedly, therefore, that the acts in question must be distinctly taken to come within the scope of their authority. And here I may observe that I cannot at all understand the principle on which two decisions of Sir Edward West, in this Court, proceeded, and which have been much relied on by the defendants. In the first of them, *Cursetjee Manockjee* v. *The East-India Company*, an action was brought by the plaintiff to recover the price of sandals which had been furnished by him as a contractor to the army. It appeared that, by a contract under seal, he had engaged to supply certain articles of clothing to the troops, not specifying sandals, and that, by a parol order of some officer of Government, he had furnished sandals also in large quantities. The Government, not conceiving he had any claim on this score, resisted the demand, and the counsel for the Company urged their objections in different forms. Sir Edward West, after some strong observations on the

moral liability of the Company, thus notices the last objections:—"The third ground of defence is, that the contract for, and delivery of, the sandals was unauthorized on the part of the Company. This objection was not placed or argued upon the right ground for the defendants. The objection is a valid one, upon the principle that a corporation cannot be bound but by contract under seal: this objection, though not taken by counsel, of course occurred to the Court," &c. &c. But it appears to me, I must confess, that the true objection was taken by counsel, and that a fallacy is lurking in the learned Chief Justice's argument. The principle is, not that a corporation cannot bind itself, except by contracts under seal, and it is not the common distinction which exists between a parol order and a deed that comes in question in these cases, and which appears to have made SIR EDWARD WEST distinguish between the two contracts; but the principle is, that a corporation can only bind itself under its common corporate seal, and a contract under seal of one of its agents is no more binding, except in the excepted cases, than a parol order by the same individual: and the contract which the learned Judge considered binding appears to have been equally destitute of the authority of the common seal as the parol contract, which, for that reason, he held insufficient.

The other case is *Amerchund Bedreechund* v. *The East-India Company, Mr. Mountstuart Elphinstone, and others*, which was trover for a large quantity of treasure, which had been seized as booty at the close of the last Mahratta war, by Captain Robertson, and which, by the order of Mr. Elphinstone, then the highest civil officer at Poonah, had been paid into the Government treasury. The refusal to give up this money by the officers of Government was proved; and yet the Court thought the verdict ought to go against Mr. Elphinstone and Captain Robertson personally, for the sum of seven lacs of rupees, and interest, but not against the East-India Company, because no demand and refusal had been made upon them. The decision seems rather startling; and one would have conceived that the true liability lay, if anywhere, with the Company, into whose treasury the money had found its way, and not with the mere agents, who were the channels used by the corporation. A demand upon the Company could only be made upon the officers of the Company, and the officers acting upon the spot appear to

have been the appropriate officers for that purpose; or, in the language of the counsel of the plaintiff in this case, to have been legally the Company itself.

And the decision, indeed, was afterwards overruled upon another ground, on appeal to England. 1 Knapp, 316.

But it is also pressed on this head, that as no order from the Court of Directors has been shewn, and as it has been by no means proved that the acts in question have conduced to the benefit of the Company, no argument can be derived from any supposed acquiescence by the authorities at home, so as to bring the defendants within the category laid down by LORD COKE, 4 Inst. 317, where the agreement to a trespass, after it is committed, is shewn in certain cases to have relation back, and to be equivalent to a previous command. But this reasoning is founded on the relation between principal and agent, which, strictly speaking, never exists in the case of a corporation; for wherever a corporation is liable at all for the act of one of its servants, acting within the scope of its authority, it is liable as principal: it is liable on the ground that it is the corporation's own act, as clearly appears from *Smith* v. *Birmingham Gas Company*, 1 Ad. & Ell. 526. 3 Nev. & M. 771, and *Maund* v. *Monmouthshire Canal*, Vol. 20 Law Journal, N. S. P. 317; whereas the liability of an ordinary principal, in such cases, is founded on another ground, namely, that laid down by Caius in the Digest, "*quod operâ malorum hominum utatur*," D. 44. 7. 5. A. ult., and as also clearly appears from LORD KENYON's judgment in *Crickett* v. *M'Manus*, 1 East, 106. The objection, therefore, resolves itself into the former question, as to whether the officers of the Corporation have been duly appointed, and whether the acts in question came within the scope of the *bonâ fide* execution of the powers committed to them.

It is next insisted that an action of trespass does not lie at all, and that it never did in the Supreme Court, against the Company, for an act done by them in their political capacity; and the decision of LORD CHIEF JUSTICE TINDAL in *Saunderson* v. *Piper*, 5 Bing. New Cases, 562, is strictly relied upon, in which a distinction is drawn between the liability of the East-India Company as to contracts made by them in their political or in their commercial character. General principle, however, independent of various Statutes upon the subject, affords a ready answer to this objection.

Whatever political powers were committed to the companies of merchants incorporated by Elizabeth and succeeding monarchs, they were never exonerated from the liability attaching to every subject of the Crown, viz. to answer the complaints of every other subject or individual wherever the Courts of the Crown were established. This liability rose up against them in India directly the Mayor's Courts were erected, viz. in 1726, though, possibly from the difficulty of bringing a corporation into Court, this liability was more nominal than real. The Charter of the second Mayor's Court, however, in 1753, fully remedied any deficiency which might exist on this score, and provided that, in actions against the Company, the appearance in the Court should be made by the Governor or President of Council. A series of Statutes, cited by Mr. *Cochrane*, viz. 26th Geo. III. c. 57. s. 37. 53d Geo. III. c. 155. s. 123. 55th Geo. III. c. 84. s. 9., and to which may be added an earlier one, the 10th Geo. III. c. 47. s. 4. & 5. carry out the ready remedy existing at Common Law, and most clearly provide for actions to be brought against the Company for the torts and trespasses of their servants committed in India; and, lastly, the Charter of the Supreme Court in 1774, at Calcutta, expressly mentions the action of trespass against the Company; and all of these without the slightest reference to any distinction between the political and commercial character of the corporation. The distinction drawn by TINDAL, C. J., as referred, appears to me to have no bearing on the present point, and is wholly referable to the subject under discussion there, viz. the excepted cases contemplated by the Act of Parliament, in which contracts were permitted to be made without the common seal of the Company.

Lastly, as to this part of the case, it is contended, that as the territorial revenues of the country are appropriated to certain specified legal debts and liabilities, and as the dividends of the proprietors are expressly exempted from such charge, and as, moreover, the Company have no other fund from which damages can be defrayed, this action cannot be maintained on the principles laid down in the *Banker's* Case, 14 State Trials, 2, by SIR CHARLES GREY, in *The Bank of Bengal* v. *The East-India Company*, Bignell 87, and *Duncan* v. *Findlater*, 6 Clarke and Finnelly, 894. But this argument appears to me to be met by the following dilemma: either the damages, to which the Company have exposed them-

selves by a *bonâ fide*, though illegal, exercise of their authority, constitute "a liability lawfully incurred on account of the Government of the said Company," or they do not. In the first case the damages come within the words subjecting the territorial revenues to the charge; in the second, the clause exempting the separate stock of the Company, and the dividends of proprietors, has no operation: *quacumque viâ*, therefore, ample funds are available.

If the question were to remain here, and were to be decided on the ordinary law relating to corporations, and on the Charter of the East-India Company, as it has been usually recognized in our Courts of Law during the last two hundred years, I confess that I incline to the opinion that the action would well lie. But the *Advocate-General* has added another line of argument, which has placed the subject in a new light to my mind, and which, after much consideration, I conceive to afford the true principle of decision applicable to the present case. For he has distinctly shewn, that, under the last Charter Act, the Charter of the East-India Company is completely changed: they are no longer an association of merchants trading to the East-Indies, filling their coffers with the commercial results of their enterprise, or with the territorial revenues of empires gained to their hands by the skill and energy of their servants: they are now to be considered, or at all events the governing portion of them, as a great department of the State, into whose hands, for high political purposes, the immediate patronage and government of India are confided; but wielding these great powers exclusively for the benefit of the State, and unable to apply them, except by the commission of high crimes and misdemeanour (which of course are not to be presumed), to their own personal advantage, or that of the corporation.

It is true that the Company receive a large portion of the territorial revenues of India, secured to them by the guarantee of the legislature, but not an iota of profit can accrue to them extra these dividends; and the remuneration is not to be looked upon as the salary for governing India, which might engender corresponding obligations on the Company, as in *Henley* v. *Mayor of Lyme Regis*, 1 Scott, 29, but as the fruits of a solemn Parliamentary contract by which the Company surrendered in fee all its splendid acquisition in the East, and received, in compensation, this

legislative annuity. But if this be the true view of the case, all the analogies upon which we have been hitherto reasoning, derived from the ordinary commercial or trading responsibilities of corporations, fall to the ground, and a new class of cases present themselves, holding forth much broader principles and much more striking analogies to help the mind to a decision. Indeed, whilst searching for the rule of law, during the former part of this argument, one feels one's self to be embarrassed and hampered by narrow principles and petty considerations wholly incommensurate with the grave questions at issue; but directly that the character of the Company is placed in its true light, and that it is seen the governing body are purely a great engine of State,—public trustees invested with all the necessary powers of Government,—our law books furnish us with abundant authority to shew that civil responsibility can never be brought home to them, except for personal misconduct. If even, in the present case, it had been distinctly proved that the acts forming the subject of the present suit had been commanded by the Court of Directors or Board of Controul, I should still have been of opinion that the plaintiff must be nonsuited. For although undoubtedly the members of those Boards, like every other great functionary of State, would make themselves personally responsible for every illegal act they might command, how would such misconduct affect the proprietors at large—the Company? They would be neither art nor part in it; they could not controul it; they could not benefit by it; and on what could their liability be made to rest? Merely on their corporate character. But the act being one of such an extraordinary nature, unconnected with the business of the corporation, and bringing down liability upon parties merely for their personal misconduct in the act, never, I think, could be held to affect the proprietors at large, even if the order in question came out under the authority of the common seal. *À multo fortiori* therefore, must their immunity from liability exist, where not even the legal participation involved in the attachment of the common seal can be alleged against them.

This view of the question appears to me to explain all the cases and all the provisions in the Acts of Parliament and Charters which the counsel for the plaintiff has so strongly urged upon us. So long as the Company were incorporated for their own benefit, every addition of

territory gained, every fresh part of commerce successively opened to their trade, brought additional profits, or the chance of them, to the proprietary at large. The Company were therefore justly made responsible for the illegal acts of their agents in prosecuting the common purpose in different parts of the globe. This explains the principle of the decision of the Judges referred to in *Skinner* v. *The East-India Company*, as mentioned in argument, and by LORD MANSFIELD in *Fabrigas* v. *Mostyn*, Cowp. 161; it explains the ground on which the action in *Moodalay* v. *The East-India Company*, 1 Brown, 469, must have been deemed to be founded; and it explains, also, the actions of tort which we have heard in this Court, before the present Charter was granted. It also accounts for the Charters of Justice and Acts of Parliament enabling actions *ex delicto* to be brought against the Company for the acts of their servants.

The only doctrine at all conflicting with the distinction now taken is that which is said to have fallen from SIR EDWARD RYAN, in 1840, in the case of *Gopeymohun Deb* v. *The East-India Company*, and the authority of that very learned person is enforced upon us with all the weight so justly due to it; but on turning to the short note of the decision in that case, in the newspaper of the day to which we have been referred, it most clearly appears that the immediate question now under consideration, viz. whether the action of tort should be brought against the Company, or against the immediate actors in the business, was in no way mooted. Any thing, therefore, that fell from SIR EDWARD RYAN on the point would be merely *obiter*, and would undoubtedly be instantly disclaimed by himself as of no authority, if the point itself should hereafter come under discussion before him. But on attending to the case itself, and to the words that fell from the Court, it appears to me most clearly that the parties contemplated by the Judges as the proper defendants were the Lottery Committee who committed the wrong, and not the innocent Company. The dictum, therefore, relied upon is really of no weight.

I have thus come to the conclusion that the action in the present case does not lie; and although I could have wished to have been able to devote more time to the preparation of my judgment, both in respect to the very able arguments urged at the Bar, and to the interesting ques-

tion involved, I confess that I put forth my opinion without much hesitation, because I feel that it is upon the safe side. For undoubtedly this Court, like every other tribunal, has an undue bias towards extending its jurisdiction, and is proved to grasp at any increase of power (so dear to human frailty), more especially when urged upon it in the flattering and eloquent appeals of suitors at the bar. It is a consolation, therefore, to think that this source of fallacious judgment has not had any place in the errors that I may have fallen into unconsciously today. It is, besides, a satisfaction to think, that, in deciding against the plaintiff, no door is opened to injustice, no great disappointment can be inflicted upon his hopes. The Parliamentary remedy, which holds out such eminent advantages to suitors against the Government, is equally available to him; and the present action, which has been launched as an experiment, has undoubtedly been founded on no clear or distinct precedent which could justify any deep-seated anticipation of success.

Indeed, with reference to this view of the case, and to the 21st Geo. III. c. 70., which affords such cogent means in this Court to aggrieved suitors in India, I confess I think the importance of our decision on the present case has been somewhat exaggerated by the counsel for the plaintiff. It is always of importance, of course, that the Court should deliver sound law; but it seems of very little moment to the plaintiff whether his remedy shall be obtained from one set of responsible parties or another.

So, also, I think the counsel for the Company have magnified our decision in the case into proportions not belonging to it; for it is contended that if this action be held to lie the Company will be harassed with an infinitude of suits for every petty act of trespass committed by their servants throughout their large dominions; but no such inference appears to me to be justly deducible. It should be recollected that the portals of this Court are already open to suits against the servants of the Company, except against those in the very highest place; and that facilities exist for poor men to urge their complaints in the Courts of British India, in a manner far superior to any which the Courts of Law in England afford: and yet I am happy to say that the records of our Court furnish few traces of any such actions having been brought; and I am still happier to think, for the honour of the British

name, that those oppressions, crimes, and tyrannies, which once formed the theme of Parliamentary denunciation and enactment, no longer find a place in this country.

Besides, also, I must add, on behalf of this Court, that it is not to be presumed that a well-organized tribunal, conscious of its duties to the public, and of its proper relation to the Government of the country, would hesitate, on behalf of that Government, to exercise the strong powers it possesses of repressing undue and vexatious litigation,—powers which it is bound to exercise in favour of individuals harassed and oppressed by an abuse of legal process, which it is no less bound to exercise in favour of Government itself.

CASE X.

PEROZEBOYE

versus

ARDASEER CURSETJEE.

21st Sept. 1843.

SUIT for the restitution of conjugal rights.

Protest to the libel against the jurisdiction of the Court, on the ground that the clause conferring ecclesiastical jurisdiction on the Court did not extend to Pársís.

The case came on for argument in the September Term, before Mr. JUSTICE PERRY, and was argued on three successive days.

Crawford, Howard, and *Holland,* in behalf of the impugnant, cited the various Statutes, in which British subjects are mentioned, and SIR CHARLES GREY'S definition of the term, Appendix to the Report of the House of Commons on the affairs of the East-India Company, 1832. 45, and *Beebee Muttra's* case, Clarke's Rules, 1834. 119.

Le Messurier, A. G., Cochrane, and *Dickinson, contra,* cited *Lindo* v. *Belisario,* 1 Hagg. 773, n.; *D'Aguilar* v. *D'Aguilar,* cited in argument in 1 Hagg. 737. 741. 763 *et seq.*; *Campbell* v. *Hall,* Cowp. 204.

The Court took time to consider, and on the 21st September following delivered judgment.

Judgment of the Honourable Mr. JUSTICE PERRY.

This suit has been instituted by a Pársí lady against her husband, for the restitution of conjugal rights. It appears by the libel that the

marriage was solemnized between the parties in 1830, according to the rites and usages of the Pársí religion, the age of the promovent being thirteen, and of the impugnant fifteen years.

The lady, on account of her tender age, and in accordance with the general custom of the Cast, did not, upon her marriage, quit her father's roof, but remained with him till February 1833, in which month she joined her husband, and from thenceforward they lived and cohabited together as man and wife till sometime in the year 1836. In that year the lady went, with the consent of her husband, on a visit to her father, but shortly afterwards returned to her husband's roof, where she was received and treated by him as before. She subsequently, in the same year, paid another visit to her father, with the like consent of her husband; but since that time the latter has always refused to receive her back, and lately, that is to say in the present year, when she went back to her husband, with a request to be restored into *consortium*, he forcibly expelled her from his house.

The libel then states that Ardaseer has lately entered into a contract for a second marriage, and that he intends to repudiate his wife without just cause, and contrary to the laws and usages of Pársís; and prays thereupon that he may be ordered to take back the promovent as his lawful wife, and that, in the meantime, he be interdicted from performing his contract for a second marriage.

To this libel the proctor for the impugnant has replied by entering a protest against the jurisdiction of the Court, on the ground that the ecclesiastical jurisdiction, under which this suit is instituted, extends only to British subjects, and that the parties to this suit are not persons intended to be described or distinguished by that term in the Charters of the Recorder's Court, or of the Supreme Court, having been born, both of them, in the island of Bombay, and being descended respectively from the race of Pársís inhabiting Guzarat, in India, and natives of India, and not being descended from persons born within any of Her Majesty's dominions, other than the territories under the Government of the East-India Company. The peculiar wording of this non-liability to jurisdiction is referable to a speculative opinion of SIR CHARLES GREY, to which I shall have occasion to refer hereafter; but, passing it over for the present, it is manifest that the broad question which is raised on

the present pleadings is, whether the Government of the Crown, or of the Legislature, or of the Company acting under their authority, have afforded any tribunal whatever to that numerous class of Her Majesty's subjects settled in Bombay, comprising Pársís, Portuguese, native Christians, Jews, &c., for the settlement of difficulties and disputes arising out of the marriage contract. Indeed, to this large class, who are exclusively governed by English law (in all cases, at least, where their contracts are not based upon a rule of their religion), the bulk of the population, consisting of Hindús and Muhammadans, must be added, because, although Casts have secured to them, by Charter, their peculiar laws as to succession and inheritance, still their right to the assistance of the Supreme Court as to controversies upon the subject now under discussion stands exactly upon the same ground as that of the parties to the present suit.

The impugnant contends that all these classes are excluded from amenability to the Court on these questions, by the use of the term "British subjects" in that clause of the Charter where the ecclesiastical jurisdiction of the Court is mentioned; and that, even if the term is large enough, *per se*, to include the native subjects of Bombay, it was the clear intention of the Crown and the Legislature to exclude them by the use of it.

The proposition is undoubtedly startling, and requires strong evidence to produce conviction that such was the intention of the authorities in England, from whom our jurisdiction has proceeded; more especially when it is observed that the impugnant suggests no other tribunal by which the question can be decided, and, in point of fact, there is no other tribunal at Bombay, or elsewhere, which has any authority on the subject. It is also to be observed, that questions like the present between Pársís and others are undoubtedly within the jurisdiction of the Company's Courts in the Mofussil, and we have some valuable printed reports on the very question sought to be raised in the present suit. Still, I fully accede to the reasoning of Sir William Russel, C. J., in *Bebee Muttra's* case, Clarke's Rules, 119, that no arguments as to the necessity for such a jurisdiction can give the Court any power to exercise it, if the Charter of Justice and Acts of Parliament have, either expressly or by necessary implication, withheld it. It is

necessary, therefore, in order to ascertain the intention of the Legislature, to observe what the course has been which the Crown and Legislature of England have adopted with respect to the laws and judicial establishments of this island; and it is the more expedient to trace, from the commencement, the origin of English laws and rights in this island, because, 1st, The acquisition of this portion of British India has been obtained in a different manner from the rest of the Company's dominions. 2dly, Because, in relation to the *vexata quæstio* of who are British subjects, the Island of Bombay and its inhabitants have always been made an exception to any conclusions drawn by the eminent Judges who have reasoned upon the matter.

Bombay, as is well known, came into the possession of the British Crown as part of the marriage portion of the Infanta of Portugal with Charles II. in 1661; and, by the cession, the inhabitants, whether Portuguese or natives, became thereupon, by operation of English law, the subjects of the King. The island, however, being found by that monarch to entail more burdens than advantages on the Crown, His Majesty in a very few years, namely, in 1669, dispossessed himself of it entirely, by granting it in fee to the East-India Company.

The Charter, by which this grant was made, contains so many provisions relating to the Government of the island, and on which both the rights and powers of the local authorities, and the rights and obligations of the inhabitants depend, that I will state them pretty fully.

The Charter first of all recites the treaty with Portugal of 1661, by which the island was ceded in full and perpetual sovereignty to the Crown ("the inhabitants of the said island, as our liege people, and subject to our Imperial Crown, &c., being permitted to remain there, and enjoy the free exercise of the Roman-Catholic religion, in the same manner as they then did"), and then grants to the East-India Company the said island and port, with all and singular the Royalties &c., in as large a manner as the same came to the Crown by the grant from Portugal; saving to us, our heirs &c., the faith and allegiance to us due, and our Royal Power and Sovereignty over all our subjects and inhabitants there, to have, hold, and possess the same, to be holden of us and our heirs as of the Manor of East Greenwich, in free and common socage, at a rent of ten pound in gold, payable yearly.

The insertion of which latter clause was for the purpose of maintaining the sovereignty in the Crown as indicated by the feudal tenure, and to secure the Crown's rights of escheat in case of the dissolution of the Company or otherwise. See *Rex* v. *Cowle*, 2 Burr. 834. The Charter then contains a proviso "that the inhabitants of the island, as our liege people, and subject to our Imperial Crown and dignity, jurisdiction, and government, shall be permitted to remain there, and enjoy the free exercise of the Roman-Catholic religion (referring to the Portuguese inhabitants); and further, also, that the said inhabitants, and other our subjects (including all other inhabitants), shall and may peaceably and quietly have, hold, possess, and enjoy their several and respective properties, privileges, and advantages whatsoever, which they, or any of them, lawfully had and enjoyed at the time of the surrender of the port and island." It then recites, that as the island is granted to the Company as aforesaid, "it is therefore needful that such powers, privileges, and jurisdictions be granted unto them as be requisite for the good government and safety thereof; and therefore enables the Company, at a general Court, to establish, under their common seal, any laws whatsoever for the good government of Bombay and the inhabitants thereof, and the same to revoke as they think fit" . . . . "and to impose and provide such pains and punishments by fines, amercements, imprisonment of the body, and, when the quality of the offence shall require, by taking away life and member, as to the said Court shall seem fit," provided "that the said laws, pains, penalties, &c., be consonant to reason, and not repugnant or contrary, but as near as may be agreeable to the laws of this our realm of England, subject to the provisos and savings hereinbefore contained" (referring to the provisos securing the free exercise of the Roman-Catholic religion to his Portuguese subjects, and which, though repugnant to the then law of England, the Company was thus disenabled from repealing).

The Charter then authorized the appointment of Governors, officers, &c.; and goes on to enable the Company, "by themselves or by their Governors, &c., according to the natures and limits of their respective offices within the said port and island, the territories and precincts thereof, to correct, punish, govern, and rule all and every the subjects of us, &c., that now do, or at any time hereafter shall, inhabit within

the said port and island, according to the laws as by the said Court shall be established; and to do all and every other thing and things which unto the complete establishment of justice do belong, by Courts, Sessions, forms of Judicature, and manner of proceedings therein, like unto those established and used in this our realm of England, although in these presents express mention be not made thereof, and by Judges, &c., by them the Governor of the said Company, or by the Chief Governor of the port and island, to be delegated."

The extent of jurisdiction is then described to extend to all actions, suits, and causes whatsoever; and the laws to govern them are to be, as near as may be, agreeable to the laws, statutes, government, and policy of England.

The only other clause which need be mentioned is one which provides "that all and every the persons, being our subjects (excluding, therefore, mere sojourners or aliens), which do or shall inhabit within the said port and island, and every of their children and posterity which shall happen to be born within the precincts and limits thereof, shall have and enjoy all liberties, franchises, immunities, capacities, and abilities of free denizens and natural subjects within any of our dominions, to all intents and purposes as if they had been abiding and born within this our kingdom of England."

This clause, it will be observed, expressly confers the rights of denizenship on all His Majesty's subjects which do or shall inhabit, and the rights of natural subjects on all who shall be born, within the island of Bombay.

I may also, perhaps, mention that the large powers hereby conferred upon the Company were to extend to all such places as they should subsequently acquire within the limits of their Charter; and undoubtedly they form a sufficient foundation on which to rest any legislation that may have been exercised by them as to the Mofussil up to the passing of the 13th Geo. III. c. 63. That Statute, however, proposing to grant to the local Government in India powers of legislation over the immense territories they had acquired, but intending probably, at the same time, to make the dependence of the Company upon the Legislature more direct, grants these powers in exactly the same terms that are used to enable a corporation of master bakers to make rules and regulations

for the government of their trade; and actually the Governor-General in Council had no authority to pass a law with the penalty of corporal punishment, extending even to a whipping, till twenty-six years afterwards; viz. till the 39th and 40th Geo. III. c. 79., where authority was granted for enforcing their rules and regulations by moderate and reasonable corporal punishment, *i.e.* by public or private whipping, or otherwise.

The Charter, then, of Charles II. is thus shewn to contain the fullest powers for governing the island which any form of words could convey: it concedes *imperium* and *jurisdictio;* and although it indicates the model on which the legal establishments and laws should be framed, it does not fetter the grantees with any technical rules derived from English judicature, which might prove wholly unsuitable to a mixed community in the East. Indeed, it displays such comprehensive views of the powers which should be necessarily conferred for the Government of a distant (already peopled) dependency, and contrasts so favourably with the obscure language of some of the later Charters of Justice, that I think we should do right in ascribing it to the pen of Sir L. Jenkins, or some other of the eminent civilians of that day.

What sort of Courts the Company established under this Charter, and what law they dispensed, I have not been able to discover, though it is clear that no other judicial authority, except what was derived from the Charter, existed in the island. I have, indeed, obtained the record of one criminal trial in 1720 from the Secretary's office, by which it appears that one Rama Comattee was indicted for high treason against the East-India Company, for conspiring with Angria, with whom the Company was then at war; and the principal overt act alleged was, an invitation sent by him to Angria to land a body of men on the island, and seize the person of the Governor at Parell, where he was attended by none but his chamber servants.

The trial was carried on by the President in Council, and five or six of the principal inhabitants; and the proceedings appear to have been conducted with as much attention to the substantial forms of justice as circumstances would permit, although I observe one fact which may afford an illustration for the next edition of Mr. Jardine's work; for during the trial the President informed the Court of the method he had

found it necessary to pursue with one of the witnesses to make him confess any thing, viz. irons were screwed upon his thumbs, the smart whereof brought him to a confession.

The indictment charged the offence to be against the peace of the East-India Company, which I apprehend is quite correct, as in the case of all grantees of jurisdiction with *jura regalia;* and the prisoner being found guilty of a high crime and misdemeanour was sentenced to imprisonment for life.

The next interposition by the Crown in respect to judicature at Bombay which it is necessary to mention, is the grant of a Mayor's Court in 1726; for some previous grants to the Company of a power to erect a Court for causes maritime, to be presided over by two merchants and a civilian, never appear to have been acted on, and indeed, from the comprehensiveness of the previous grant, were never necessary at Bombay. In 1726, however, Geo. I., on a petition of the East-India Company, suggesting that further powers were required by them for the punishing of crime and administering of justice in their different factories and settlements, determined, for the furtherance of the same, to establish proper Courts of Justice; and for that purpose erected three Corporations, at Bombay, Madras, and Calcutta, with various jurisdictions, civil and criminal, the power of which is described to extend "over all civil suits, actions, and pleas that shall arise within the factory." Whether these terms are sufficiently large to comprehend all civil jurisdiction whatever, as in the previous grant to the local Government of Bombay, is a question that never has been raised; but if they are not, I apprehend that the powers granted to the Company of establishing Courts at Bombay for the complete administration of justice still remained in them; and that if any powers were wanting to the Mayor's Court, they might have been attributed to it as a Court of the Company, in addition to its authority as a Court of the Crown.

However this may be, in 1753, the Corporation at Madras having been dissolved by the recent capture of Fort St. George by the French, and by the death or dispersal of the Mayor and Aldermen, the Company petitioned for another grant of incorporation at their three settlements of Bombay, Madras, and Calcutta, which was accordingly granted them

on a surrender of the previous Charter; and in the specification of the civil jurisdiction of the Mayor's Court at Madras, it was provided that it should extend to all civil suits, actions, and pleas between party and party, with an exception of "such suits and actions as should be between the Indian Natives of Madras *Patram* only; in which case we will that the same be determined among themselves, unless both parties shall by consent submit the same to the determination of the said Mayor's Court."

The civil jurisdiction of the Court of Bombay is not defined at length, but is expressed to extend to "all civil suits, actions, and pleas between party and party, that shall or may arise or happen, &c. within the said town or factory of Bombay, or in the like manner and under the like restrictions as the Mayor's Court at Madras is hereinbefore empowered to do."

An inaccuracy of language is here introduced as to Bombay, in stiling it a factory, which, unlike the first Settlements at Surat, Calcutta, and elsewhere, it undoubtedly never was; and a question might have arisen, whether, under the restrictive words as to the Madras Court, limiting jurisdiction over natives to voluntary contests, the rights of the King's native subjects at Bombay to sue in the Courts of the Crown were thereby taken away. SIR CHARLES GREY has shewn very satisfactorily what was the probable origin of the clause as to Calcutta and Madras, viz. a hesitation to assert any territorial dominion in India; and the want of any necessity as to those two settlements may be also pointed out. The natives at that time in Bengal were, at all events nominally, subjects of the Mogul, and the Native Courts were administered in his name; and in Madras a morning's walk was sufficient to carry any native, who might desire to implead his adversary, out of the precincts of the factory.

But as a very different state of facts existed at Bombay; as no doubt ever could have arisen here as to whom the inhabitants of the island were subject; as no other tribunal was at hand to which they could refer their complaints; and as there are no express words taking away from the natives of Bombay their rights of British subjects (even if any such words could have been operative); I take it that the true construction of the Charter is, that the restrictive words in the Charter did not

apply to the inhabitants of this island, and that they are to be referred to the clauses relative to suing the Mayor or Magistrates. Certain it is, that the Mayor's Court here dispensed justice to such inhabitants, and, amongst other matters, exercised ecclesiastical jurisdiction.

The next step taken in England as to Bombay was the establishment, by the Legislature and the Crown, of a Recorder's Court.

The 37th Geo. III. c. 142. s. 9., after reciting the previous Charters of Justice, enables His Majesty to erect Courts of Judicature at Madras and Bombay, "which said Courts shall have, and the same are hereby declared to have, full power and authority to exercise and perform all civil, criminal, ecclesiastical, and admiralty jurisdiction, &c. &c. &c., and to all such other things as shall be necessary for the administration of justice."

Section 10. expresses that the jurisdiction shall extend to all British subjects who shall reside within any of the factories subject to Madras and Bombay; and Section 11. declares that the Courts may try all manner of suits and actions, civil and criminal, which, by the authority of any Act or Acts of Parliament, may now be tried in the Mayor's Court at Madras or Bombay (a clause I believe of surplusage, for I have never yet heard of any Act of Parliament attributing jurisdiction to the Mayor's Court); and it then goes on to exclude from jurisdiction certain persons and matters, in accordance with the previous Statute passed relatively to the Supreme Court at Calcutta, 21st Geo. III. c. 71.

Section 13. gives the jurisdiction as to all suits and actions that may be brought against the inhabitants of Bombay; and undoubtedly a distinction is drawn in this Act as to the jurisdiction over British subjects and natives.

The Charter of the King, given under this Act, is dated February 1798, and, incorporating the previous provisions, erects the Recorder's Court at the two Presidencies; and it is unnecessary to mention the terms in which jurisdiction is parcelled out, as they seem to be precisely the same with those afterwards used in the Charter of the Supreme Court, and which I will state presently.

The next step was the erection of the Supreme Court at Bombay, by the 4th Geo. IV. c. 71. ss. 7., 8., and 9., and the Charter granted in pursuance thereof. Section 7. of that Act empowers His Majesty to establish

a Supreme Court at Bombay, with full power to exercise such civil, criminal, admiralty, and ecclesiastical jurisdiction, both as to natives and British subjects, and to be invested with such powers and authorities for the better administration of the same, and subject to the same limitations, &c., as the Supreme Court of Fort William in Bengal is invested with. The Charter of Geo. IV., of December 1823, under which the Court is at present sitting, describes the jurisdiction of the Court to extend "to all such persons as have been heretofore described and distinguished in our Charters for Bombay by the appellation of British subjects;" and also gives power "to hear and determine all suits and actions that may be brought against the inhabitants of Bombay."

The criminal jurisdiction is declared to extend to "all our subjects" in any of the territories subject to the Presidency; and the ecclesiastical jurisdiction is to be executed "towards and upon all persons so described or distinguished by the appellation of British subjects as aforesaid," "so far as the circumstances and occasion of the said town, island, territories, and people shall admit or require, and to grant probate of their wills, &c.:" so far copying the Calcutta Charter, but containing an additional clause allowing the Court to grant probate to the last wills of all persons (whether subjects or not) who shall die within the Presidency leaving personal effects there.

Upon an attentive perusal of these Charters and Statutes there appears to me to be a clear and well-expressed intention to afford to all who may be subject to the jurisdiction of the Court—a tribunal before which every difference that could arise in civilized society might be adjusted—power, in the words of the first Charter of Charles, "to do all things which unto the complete establishment of justice do belong, although in these presents express mention be not made thereof;" power, in the words of the first Statute relating to Bombay, 37th Geo. III. c. 142. s. 9., to perform all civil, criminal, ecclesiastical, and admiralty jurisdiction, "and to do all such other things as shall be necessary for the administration of justice;" power, in the terms of the 4th Geo. IV. c. 71. s. 7., under which this Court was established, to exercise such civil, criminal, admiralty, and ecclesiastical jurisdiction, both as to natives and British subjects, as the Supreme Court at Calcutta is invested with; and, lastly, power, under the Charter, to

determine all matters which might have been disposed of in the Mayor's Court, or in the Court of the Recorder. In opposition to these authorities, largely conceived as they are, I do not see the least indication to restrict the jurisdiction on any side of the Court, as to any class of persons who are in other respects amenable to it (the origin of the restrictive clause as to natives, in the Charter of 1753, having been already pointed out).

And this course, which is now seen to have been adopted by the Government of England with respect to the jurisdiction which it established in this island, is exactly what might have been predicated of any enlightened Government with a dependency at such a distance; and is, in fact, exactly what did take place in a very parallel instance, namely, when Asia, reduced into a province, fell under the Roman sway: for we learn from the Digest, that immediately on the acquisition of any such important conquest by the Republic, the administrative officers sent there by the Senate were invested with all powers of jurisdiction whatever, as exercised at Rome, "*Cum plenissimam autem jurisdictionem Proconsul habeat, omnium partes, qui Romæ vel quasi Magistratus, vel extra ordinem jus dicunt, ad ipsum pertinent,*" Dig. Lib. I. Tit. 16. L. 7. s. 2.: and I cite this passage the more pointedly, because it appears to me to afford a happier analogy to the case under discussion, than the illustrations which have been drawn from the condition of an infant colony settling themselves on an uninhabited shore.

The only argument which the counsel for the impugnant addresses against the existence of this jurisdiction is the use of the term "British subjects" in the ecclesiastical clause of the Charter; and a series of Statutes is cited, which will be found collected by Sir Charles Grey in his Letter to Government in the Fifth Appendix to the Commons' Report on East-India affairs in 1831, p. 68, and which undoubtedly shew, that however ambiguous and difficult to define the term may be, still in those Statutes it never does comprehend native subjects. Sir Charles Grey himself attempts a definition of the expression, and it is upon his views, as there stated, that the present protest is founded. But it seems to me unnecessary to come to any decision on the present occasion, as to whether the parties to this suit are comprehended under that term in the ecclesiastical clause, or not. Undoubtedly, wherever the

phrase "British subjects" is used in an Act of Parliament, passed with a view of affording protection to natives against European aggression, and wherever a favourable interpretation to natives would require their exclusion, it seems a most fit canon of construction that they should be so excluded. But if the present question were to be decided on the interpretation of a clause under which inhabitants of Bombay could only secure the protection of Courts of law by putting forward their titles as British subjects, I should be, I must confess, most unwilling to hold that any rule intervened to deny them that protection to which every subject of the Crown is entitled. But, as I said before, it is unnecessary to determine this point; for on the distinct grounds taken by the Supreme Court at Calcutta in 1832 in *Bebee Muttra's* case, Clarke's Rules, 119, I am of opinion, that even if the term "British subjects" in the Charter does not include natives, the general ecclesiastical jurisdiction of the Court, which extends to them under the Act of Parliament as inhabitants, exists in full force, and is equally extensive with the civil, criminal, and admiralty jurisdictions, which are all grouped together in the same clause. The insertion of the clause in the Charter as to ecclesiastical jurisdiction over British subjects, I apprehend, proceeded *ex majori cautelâ;* for it having been previously expressed that the jurisdiction of the Court (comprehending every thing) should extend to British subjects, it was possibly thought that doubts might arise whether the exemption of settlers in colonies from ecclesiastical jurisdiction, as mentioned by BLACKSTONE, Com. I. 108, might not be deemed to extend also to the British in India; and hence the repetition, in particular terms, of what had been previously granted generally. But in the clause of jurisdiction as to inhabitants, the terms used are, "all suits and actions that may be brought against the inhabitants of Bombay;" and most undoubtedly these terms are quite large enough, with the intention already expressed, to include an ecclesiastical suit like the present.

I have thus, at wearisome length, traced out from the commencement the jurisdiction which has existed at Bombay, and which has been continued down to the present day; and I have done so, not because my mind was left in any doubt, at the close of the argument, that the ecclesiastical jurisdiction as to natives (which, by the bye, has nothing

ecclesiastical about it but the name), and which has been successively exercised in this Court, both by the Mayors, the Recorders, and by previous Judges on this Bench, was illegal; but because an intimation was expressed on the part of the impugnant to carry this case home on appeal if the decision should be against him: and I therefore thought it desirable, for the sake of both parties, to set out the materials fully on which my judgment proceeded, so as to enable their Lordships in the Privy Council to decide at once on its sufficiency or otherwise.

I ought to add, that although the CHIEF JUSTICE, from illness, was unable to attend on the argument in this case, he fully concurs in the conclusion, that the ecclesiastical jurisdiction does extend to Pársís. The result is, that this protest must be discharged.

No. XI.

LUXUMEBOYE, NEXT FRIEND OF RAMCHANDER SUCCARAM, AND OTHERS

versus

SUCCARAM SADEWSETT AND OTHERS.

5th February 1844.

SIR E. PERRY, J., delivered judgment this day.

This is an application, which has been made under the 185th of the Equity Rules, for leave to file a bill on behalf of two infants. By the practice in England, any one may institute a suit of this nature; and the only check which exists upon an improper use being made of such power arises from the reference to the Master which takes place on such occasions if any representations be made to the Court that the suit is not for the infant's interest. But in this country, where, from the combination of all kinds of jurisdiction in the hands of the Judges, and from the personal intercourse which thereby frequently arises between suitors and the Bench, a greater facility exists for Judges to make themselves acquainted with the subject-matter of litigation than occurs in England, a different rule prevails; and the next friend, seeking to institute such a suit, must previously obtain the leave of the Court, by shewing on affidavit what the circumstances and reasons are which make it for the benefit of the infant that the suit should be instituted.

I do not consider that the present affidavit contains any such circumstances or reasons. It sets out facts shewing that the infants belong to an undivided Hindú family possessing landed property; and that so far back as 1836 a number of the members of the family, in fraud of the other members, mortgaged the property; and that the mortgagees are now suing the mother of these infants, and the infants themselves, in ejectment, to recover the possession. But it alleges that the mortgagees ought to be enjoined from maintaining the ejectment, as they cannot proceed upon it at law; and that as the infants are entitled to demand partition, the mother, as *prochein amy*, intends immediately to file a bill for such partition of the undivided family estate.

The suit, then, which it is proposed to institute, is one for the partition of the family estate. Now, in order to warrant a suit being instituted for such purpose, it ought to be made out satisfactorily that such partition would be beneficial to the infants. No *prochein amy*, on his own mere motion, much less on any personal interest, can step in on behalf of the infant and require a partition to be made, but he must shew strong grounds to warrant the Court in authorizing a proceeding which, *primâ facie*, is hostile to the infants' interests. It is true that it is stated here that other members of the family committed a fraud upon the infants some years ago, and mortgaged away the property; but, according to the affidavit, the mortgagees obtained no title by the fraudulent conveyance, and cannot succeed in their ejectment. But if this be so, no ground whatever is shewn for the partition. If the defendants in the ejectment obtain a verdict, the legal estate will remain in the undivided family, and there is not the least vestige of reasoning in the affidavit to shew that the partition would in that case be desirable. In other words, if, as the deponent alleges, certain members of the family committed a fraud upon the infants seven years ago, there is nothing whatever to indicate that the family are not upon the most amicable terms now; and indeed, from the occupation of these premises being in the deponent, and from the absence of any statement whatever as to any attempt by the other members to injure herself and her children, the conclusion which I should think myself at liberty to draw (if a conclusion upon the point were necessary) is, that the family are not only undivided at present, and amicably inclined to one another, but that the

suit for a partition is one agreed upon amongst themselves in order to defeat other claimants.

For these reasons I think that this application, at all events at present, must be refused. If, on the trial of the ejectment, any equity appears which is not suggested at present, it may be time to consider whether it should be then granted.

Such is the decision which I think ought to be come to upon the facts as stated in the affidavit; but when to that is added the knowledge which the Court judicially possess of this case, it seems to me that it would be a wilful disregard of the interests of justice not to take notice of it. This case has been three years in litigation before the Court. The woman now seeking to sue as *prochein amy* obtained, some time ago, the assistance of the paupers' attorney to her case; and after a most careful attention of every thing she had to allege, that officer proposed an arrangement most favourable for the infants' interest, which the mortgagee agreed to, but which the mother and the family at length, after at first assenting to it, repudiated. The whole case was before me on the day this application was made upon the report made by the paupers' attorney; and as this has been, until very lately, a pauper's case, I consider the report of that officer as altogether equivalent to a Master's report, if a reference had been made to the latter according to the practice in England.

On the grounds, therefore, stated in that report also, as well as on those I have before urged, I do not consider that this suit would be for the infants' interest; and even if it were, I do not think that the Court would be justified in allowing such an irresponsible person as the present *prochein amy*, a pauper and a Hindú female, to institute the suit.

No. XII.

TAJOO CHANGIA

versus

WALLIA PANCHAE, HURRY PANCHAE, HASHIA PANCHAE, MAHADOO GOMA, AND AGA MAHOMED RAHIM SHERAZEE.

12th February 1844.

THE bill in this case prayed a partition of an estate, of which the plaintiff claimed to be entitled to three-fourths by descent and purchase, and the defendants to one-fourth.

By the answer it appeared that the one-fourth share belonged to the three first defendants and their deceased brother in co-parcenary, and that the mother of the fourth defendant, being the wife of the deceased, ought to have been made a party.

The bill and answer having been set down for argument on this objection, *Dickinson* was heard against the objection, and *Herrick, contra.*

SIR ERSKINE PERRY, J., gave judgment.

In this case the bill prays a partition of an estate of which the plaintiff by descent and purchase is entitled to three-fourths, and the four first defendants to the remaining one-fourth; and it further prays that the plaintiff may be declared entitled to compensation for various sums of money that he has laid out in improving the estate, and that his claim may be declared a lien on the one-fourth share, and that such share may be sold to meet his claim, if the Court shall think it desirable.

By the answer it is shewn that the one-fourth share belonged to the three first defendants and their deceased brother Goma in co-parcenary, and that their brother left a widow, the mother of the fourth defendant, and suggests that she ought to have been made a party to the suit.

The objection has been set down for argument under Rule 112 of our new Rules, and was argued accordingly in Chambers before me a few days ago.

It is admitted on both sides, that if the bill prayed merely a partition the widow could not be a necessary party; and that in a partition suit it is only when the actual share out of which she is entitled to maintenance is about to be divided that she must be brought in: and the reason of this is very obvious; for in the latter partition she claims

adversely to her sons, who are about to divide the paternal estate, and therefore ought to be present in the suit to defend her distinct interest; but in the former case of partition, where her husband's share is to remain undivided, her rights and interests are fully represented by her sons.

It is contended, however, here, that as this bill goes on to pray a sale of the one-fourth part, including the husband's share, and to deduct from the price the compensation which the plaintiff claims, the result will be to diminish the security which accrues to the widow for her maintenance; and *Rajchunder Mozendar* v. *Gonordass Mozendar*, Morton, 88, is relied upon.

In that case the bill sought to establish a will, and prayed a partition of such parts of the real estate as were not devised; and the Court held that the testator's widow ought to have been made a party on account of the will, as otherwise she would not be bound by the decree of the Court establishing it.

The will, however, in that case, disposed of a portion of her husband's estate, on the whole of which, at his death, she had a security for maintenance. And although I think that, according to Hindú law, it might have been held, as in the previous case in Morton, that the widow's interest was represented by her sons; still, as, in the case of a partition of the whole estate, she would have been entitled to a share as against her sons, one perceives some ground for maintaining a separate interest in her under the will, which would require her to be a party.

But in the present bill the object prayed is, to ascertain what the undivided fourth part, in which her husband had a share, amounted to, after deduction of the claims upon it upon her husband's death; and although, of course, she is interested to make that share as large as possible, still, as exactly the same interest exists in her son, and in a much more forcible degree, he being entitled to the land, she, so long as no partition is prayed of her husband's share, to maintenance only, I conceive that the case falls much more within the analogy of the general principle in Hindú law, which does not require the widow to be a party to such a suit, than of the exceptional case relied on, where a will exists.

VOL. II.] [PART IV.

AN

ANALYTICAL DIGEST

OF ALL

THE REPORTED CASES

DECIDED IN THE

SUPREME COURTS OF JUDICATURE IN INDIA,

IN THE

COURTS OF THE HON. EAST-INDIA COMPANY,

AND ON APPEAL FROM INDIA,

BY HER MAJESTY IN COUNCIL.

TOGETHER WITH AN INTRODUCTION,

NOTES ILLUSTRATIVE AND EXPLANATORY, AND AN APPENDIX.

BY

WILLIAM H. MORLEY,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW,

MEMBER OF THE ROYAL ASIATIC SOCIETY, AND OF THE ASIATIC SOCIETY OF PARIS

"IF IT BE ASKED HOW THE LAW SHALL BE ASCERTAINED WHEN PARTICULAR CASES ARE NOT COMPRISED UNDER ANY OF THE GENERAL RULES, THE ANSWER IS THIS: THAT WHICH WELL-INSTRUCTED BRAHMANS PROFOUND SHALL BE HELD INCONTESTABLE LAW."

MENU, B. xii. v. 108.

IN TWO VOLUMES

VOL. II.

CONTAINING THE APPENDIX.

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Blackstone's Commentaries, Introd. Sec. 2.

No. XIII.

IN THE MATTER OF MARK PORRET.

13th March 1844.

Crawford, in the February Term of this year, obtained a rule *nisi* for a *habeas corpus* to be directed to the jailor of Bombay to bring up the body of Mark Porret, who was under sentence of transportation to New South Wales. The rule was granted on an affidavit of the prisoner, which stated that he was a conductor attached to the Bombay army, and had been tried by a Court-Martial held in Scinde, under and by virtue of a warrant granted by His Excellency Lieutenant-General Sir Thomas Macmahon, Commander-in-Chief of the Bombay army, and that the sentence of the Court-Martial had not been duly confirmed.

On cause being shewn by the *Advocate General* against this rule, it appeared that the prisoner had been tried by a Court-Martial which had been convened by Major-General Sir Charles Napier in Scinde, where he was commanding a force belonging to the armies of the Bengal and Bombay Presidencies; and it was suggested, that as Sir Charles Napier might have authority to convene and confirm Courts-Martial under a warrant from Her Majesty, or from the Governor-General in Council, the Court would pause before it would set a prisoner convicted of felony at liberty.

Mr. JUSTICE PERRY thought, that as the prisoner had the power of calling for the production of the proceedings under which the Court-Martial was held (Sec. 26. of the Indian Mutiny Act), and had failed to do so, it was too much to presume that Sir Charles Napier had acted without due authority; but the rule was made absolute, with directions that the prisoner should be brought up in the ensuing Term, when information could be obtained from Calcutta as to the authority under which Sir Charles Napier had acted.

The prisoner was accordingly brought up on the 11th March following, and by the return it appeared that the Court-Martial was held under a warrant issued to Major-General Sir Charles Napier by Lieutenant-General Sir Thomas Macmahon, and that it had not been confirmed by the latter, but that it bore the following note at the foot:—"Confirmed. C. J. Napier, Governor."

Crawford thereupon moved that the prisoner be discharged.

Le Messurier, A. G., contra, contended that no confirmation was necessary; that the trial was held under Sec. 16. of the Indian Mutiny Act, which is silent as to confirmation; and although Sec. 67. of the Articles of War enacts that confirmation is necessary, if it clashes with the Statute the latter must prevail.

SIR ERSKINE PERRY, J., gave judgment.

In the case of Mark Porret, who was brought before me by *habeas corpus* on Monday last, the return states that the prisoner is in the custody of the Marshal of the jail, under a sentence of a Court-Martial, which was held under a warrant granted by His Excellency Sir Thomas Macmahon to His Excellency Sir Charles Napier; and as the proceedings on the former return, and in the former rule, are referred to, they may be taken as before the Court on the present occasion, though, in strict procedure, possibly the return should have been amended by inserting them. By these proceedings it appears, that, at a Court-Martial held at Kurachi on the 23d of August last, Mark Porret, being a subconductor belonging to the Bombay army, was tried upon two charges, the first of which in substance was, the having, on a sale of unserviceable Government stores, altered the figures in a sale list, with the fraudulent intention of appropriating the difference; the second, the having embezzled and fraudulently misapplied money of the Government, amounting to Rs. 170, or thereabouts.

The Court, upon the first charge, found him guilty, with a slight exception not necessary to be noticed here; and upon the second they likewise found him guilty in these terms, "guilty of substituting the amount of Rs. 159 and 9 annas for Rs. 170, or thereabouts, such conduct being most disgraceful and unbecoming the character of a warrant officer." The sentence of the Court was, that the prisoner should be transported as a felon for seven years.

This sentence was confirmed by Sir Charles Napier in the following manner — "Approved and confirmed by C. J. Napier, Governor;" and the prisoner was sent down under a military escort to Bombay for the purpose of being forwarded to his destination.

The prisoner was brought before the Court on a *habeas corpus* in last November Term, when the above facts appeared, with the further one, that no warrant authorizing his detention in jail had been delivered

to the Marshal. But as this latter point has been urged unsuccessfully as an objection in cases of prisoners in England, for instance, in the *King* v. *Suddis*, 1 East, 306, and in late cases of the Canadian prisoners, it may perhaps be considered as settled law that it is not absolutely necessary that a warrant should accompany a prisoner in the course of his detention under sentence of a Court of competent jurisdiction. But a variety of other objections were then urged, as to the adequacy of the sentence, as to the deficiency of the proceedings in point of form, and, above all, as to the power of Sir Charles Napier to hold and confirm Courts-Martial, most of which were of an important character, and fit to be considered somewhere; but serious questions arose as to how far it was competent to this Court to entertain them.

Some of these objections, however, were disposed of at the time, but as to others there was a deficiency of facts, in the absence of which the Court did not think it fit to pronounce any decision; more especially as nice points of military law were involved, on which very little assistance was to be derived from the usual sources of legal information.

The case has come twice before the Court since November Term last, on the first of which occasions a copy of the warrant granted by the Commander-in-Chief of Bombay to Sir Charles Napier was set out; and now, on the face of the present return, it is stated that the Court-Martial was held by virtue of that warrant.

Whether, in point of fact, it was so or not, and whether the Court is in possession of all the circumstances which have raised the difficulty in the present case, so as to enable it to apply a solution, may perhaps be doubted.

At the previous argument in this case much reliance was placed by the counsel for the prisoner on the objection arising out of what was termed the disproportionate punishment awarded to him in reference to the offence committed; but it was clear that this Court had no jurisdiction whatever to interfere on any such ground. The power of awarding punishment for military offences is left entirely to the discretion of Courts-Martial, and of the authority by whom they are appointed; and when a discretionary power is thus vested, the Queen's superior Courts have no power to controul it, even in the case of subordinate Civil Courts. It is equally clear that all objections made to want of due

formality on the face of the proceedings in the Court-Martial could not be listened to by this Court. It has been laid down over and over again, that the superior Courts are not Courts of Review for a Court-Martial. In *Serjeant Grant's* Case, 2 H. Bl. 107, there was an undoubted informality in the finding of the Court-Martial; but LORD LOUGHBOROUGH disposed of it in these terms—"It would be extremely absurd to comment upon it, as if it were a conviction before Magistrates, which was to be discussed in a Court where that conviction could be reviewed." LORD DENMAN adopted the same language in a case in p. 688 of 5 B. and Adol.; so also in *Rex* v. *Suddis*, 1 East, 306, where, also, an imperfect finding of a Court-Martial came before the Court of King's Bench. LORD KENYON said, in answer to the objections made by the counsel of the prisoner—"We are not now sitting as a Court of Error to review the regularity of their proceedings, nor are we to hunt after possible objections." The objection made in that case was indeed very like the objection made in the present, namely, that although, under certain circumstances, the Court-Martial might have had jurisdiction to award the punishment they had ordered, still these circumstances did not appear on the face of the proceedings. But MR. JUSTICE GROSE, after stating the objection, answered it thus—"That, however, is an objection in error, and we do now sit as a Court of Error. It is enough that we find such a sentence pronounced by a Court of competent jurisdiction to inquire into the offence, and with power to inflict such a sentence: as to the rest, we must presume *omnia rate acta.*"

And the principle of the non-interference of the Courts of Law with the procedure of Courts-Martial is clear and obvious. The groundwork of the jurisdiction, and the extent of the power of Courts-Martial, are to be found in the Mutiny Act and the Articles of War; and upon all questions arising upon these Her Majesty's Judges are competent to decide. But the Mutiny Act and Articles of War do not alone constitute the military code, for they are, for the most part, silent upon all that relates to the procedure of the military tribunals to be erected under them. Now this procedure is founded upon the usages and customs of war, upon the regulations issued by the Sovereign, and upon old practice in the army, as to all which points Common-Law Judges

have no opportunity, either from their law books, or from the course of their experience, to inform themselves. It would therefore be most illogical, to say nothing of the impediments to military discipline which would thereby be interposed, to apply to the procedure of Courts-Martial those rules which are applicable to another and different course of practice.

The objections, therefore, which were founded on the informality of the sentence, and its want of finding distinctly whether an act of embezzlement had been committed, were not argued by counsel subsequently to the first argument. But although the principle of non-interference was thus distinctly laid down by the Court, and the inclination to presume every thing in favour of the tribunals established by the Legislature was strongly manifested, still the grounds on which it is the bounden duty of this Court to interfere, on the demand of any British subject to have the protection of the law extended to him, were equally present to their minds. LORD LOUGHBOROUGH, in a case where the sentence of a Court-Martial was in question, laid down the law on this point thus—"Naval Courts-Martial, military Courts-Martial, Courts of Admiralty, Courts of Prize, are all liable to the controlling authority which the Courts of Westminster Hall have from time to time exercised for the purpose of preventing them from exceeding the jurisdiction given to them." A Court-Martial sits under the authority of the Mutiny Act and of the Articles of War; its constitution and powers as to all the graver offences are strictly defined by their express provisions; and if any parties but those contemplated by the Legislature assume to wield the powers therein defined, their proceedings are altogether void, and, in law language, *coram non judice;* or if, the Court being duly constituted in the first instance, a procedure is adopted, or sentence awarded, contrary to the enactments of the Legislature, such sentence is wholly illegal. Again, if any question arises as to what the proper construction of the Statute upon the matters contained in it is, and difference of opinion takes place amongst those who have to carry out its provisions, the competent tribunal, and the only competent tribunal, to decide the difficulty, is that with whom the construction of all Acts of the Legislature ultimately rests, namely, Her Majesty's Courts of Law.

It is impossible to help perceiving that such a difficulty exists in the present case; and however much indisposed the Court may be to pronounce any decision upon a Statute which has but rarely formed the subject of legal controversy, and under which some divaricating practice may perhaps have occurred, still it is impossible to advert to the different positions on which the authority to hold Courts-Martial has been grounded on the one side, and to those on which it has been attacked on the other, without recognizing the fact, that the greatest uncertainty prevails upon the subject, and that no clear rule has been advanced by either party towards a solution of the difficulty. But as, in the words of that great judge, LORD STOWELL, it is the office of the Court to dispose of difficulties where they arise, not to state them; to decide, not to doubt; I will endeavour to lay down as briefly as possible what, upon a review of all the Mutiny Acts relating to this country, and of the military code in England, I conceive to be the true exposition of the law with reference to the points raised in the present case.

The chief questions of difficulty which have arisen may, I conceive, be stated as follows: First, in whom has the Legislature vested the power of authorizing the holding of Courts-Martial over the Company's forces in India? Secondly, in what mode is the power so granted to be delegated? It is evident that these two questions are essentially distinct. The Legislature may have defined very distinctly the authorities from whom the power is to proceed; but in pointing out the mode in which the delegation of authority is to be made, expressions may have been used, and unforeseen cases may arise, which may render it very difficult to say how that power is to be put in exercise. Again, as provisions would have to be expressed in the Act to embrace these two different objects, it may occasionally occur that the terms so used with respect to the one subject matter will apparently clash with those previously laid down with respect to the other; and then the question arises,—which is a question of construction,—How are these several provisions to be reconciled, so as to carry out the intention of the Legislature?

Now, as the sole end of all rules of construction with respect to written instruments, and more especially with respect to Acts of Parliament, is to ascertain what the true intent and meaning of the language

used amounts to, it is evident that no approach to any accurate conclusion on the subject can be made, without a careful survey of the circumstances which existed at the time when the Legislature interposed its authority, and of the objects which were chiefly in view in exerting legislation at all: so soon as these are distinctly ascertained, a clue is provided by which any ambiguity that may arise on particular expressions can be solved.

The objects of the Mutiny Act are very easily ascertained. The first and main object is clearly expressed in the preamble to the English Mutiny Act,—maintenance of military discipline by the erection of summary tribunals unknown to, and unauthorised by, the common law. The second object, which is only subordinate to the first, and which, though not expressed in terms, is equally apparent on the face of the Act—to interpose in favour of the individuals necessarily subjected to such anomalous Courts a variety of checks and limitations, calculated to guard against misdecision, and to rectify it when it occurs.

The circumstances of the country, that is to say, the state of the army, to which the Indian Mutiny Act was to be applied, requires a few, and but a few, more words. Powers of martial law appear to have been first committed to the Company by one of the earlier Charters. At that period, which was before the revolution, such powers were supposed by the Crown to appertain to it, and were undoubtedly exercised by it, as the head of a feudal monarchy; but how far such powers could be delegated to one set of British subjects over another may perhaps be a question, though it is one of no interest on the present inquiry; for when the collisions between the French and English companies under Dupleix and Lawrence produced the effect of introducing into India European troops in greater numbers than theretofore, and when, moreover, King's regiments began to be sent out in aid of the slender forces then in the pay of the Company, it was found necessary to base the military power over these various troops on a better defined and more undoubted authority; and accordingly the 27th Geo. II. c. 9. was passed. That Statute introduced the same principles, couched in nearly the same language, with respect to the government of the Company's forces, as the English Mutiny Acts contained with respect to the forces of the Crown. The Act, in all its

main provisions, corresponds with the Act now in force: the same power is vested in Her Majesty to issue her warrant, and to frame Articles of War, and the same power of authorizing Courts-Martial is attributed to the Commander-in-Chief of the forces of the Crown, as exists at present; and nearly all the clauses on which any difficulty now arises will be found to exist almost *in terminis* there. It is therefore most important, for the purpose of ascertaining the meaning of any expressions in the Act now in existence, to look back to the first Statute, and see how they were used then. This Statute, with a slight addition in the 1st Geo. III., continued to be the law for the army for nearly seventy years, namely, till 1823, when the 4th Geo. IV. c. 81. was passed. That Statute, which has been since supplied by the 3d and 4th Vict. c. 37., contains an expanded enactment of the various provisions comprised in the first Indian Mutiny Act, with the addition of such provisions as it had been found necessary to introduce from time to time into the English Mutiny Acts. And this leads me to note the source of the difficulties which occur on the construction of the Indian Acts; for whereas the Mutiny Acts relating to Her Majesty's forces recognize but one army, one Commander-in-Chief, and one Judge Advocate General, the Mutiny Act for the Company's force recognizes quite as distinctly the fact, as it exists, of three separate armies belonging to the several Presidencies, three Commanders-in-Chief, and three Judges Advocate General. Nevertheless, in various passages of the Indian Act it will be found that this essential distinction between the two forces has been lost sight of, or not clearly marked; and language referring to the one English army, and the one Commander, has been transferred verbatim to the Indian Statute, from whence the ambiguity arises as to which of the three armies and Commanders-in-Chief the singular term used has reference.

Having thus stated the objects of the Legislature in passing the Mutiny Act, and the state of the forces to which it was applicable, namely, their division into three distinct armies, it now becomes easy to proceed to the first question to be considered, namely, in whom has the Legislature vested the power of authorizing Courts-Martial over the Company's forces in India?

This question depends upon the true meaning which is to be attri-

buted to Sec. 9. of the 3d and 4th Vict. c. 37., or rather to the proviso at the end of it. That Section enables Her Majesty to authorize the Court of Directors to empower the Indian Governments and their Commanding Field Officers to appoint Courts-Martial, but this only in certain cases, namely, wherever none of Her Majesty's forces are employed under the Company's Presidencies. In this latter case, the power over Courts-Martial is absolutely and exclusively vested in the Commanders-in-Chief of the Presidencies where such Queen's forces are employed. The terms of the proviso are these—" Provided that, whenever any of Her Majesty's forces shall be employed to act under the authority of any of the said Company's Presidencies in the East Indies, the power of appointing Courts-Martial, or authorizing the appointment of Courts-Martial, for the trial of any officer or soldier of the said Company of or belonging to such Presidencies, shall be in the officer for the time being commanding-in-chief at such Presidency."

These words, therefore, give an absolute statutory power to the Commanders-in-Chief to institute Courts-Martial; and that they also vest this power in such officers exclusively, so long as Her Majesty's forces are employed at the Presidency, is apparent from the consideration, that if it were also competent to the Crown to issue its warrants concurrently to the other authorities mentioned in the previous Section, two different authorities would be enabled to convene Courts-Martial for the same offence, two different Courts might be held, and two different sentences pronounced, which is absurd; or, at all events, a collision of authorities would be rendered possible, which, it must be presumed, could not have been in the contemplation of the Legislature.

The question, therefore, is considerably narrowed at the outset, by shewing that the only parties in India who are authorized to institute general Courts-Martial (certain excepted cases excepted) are the three Commanders-in-Chief at the different Presidencies. This being so, there is no difficulty whatever in understanding the meaning of the terms used in the proviso as to the different jurisdictions to be exercised by the three Commanders-in-Chief in the great majority of cases likely to arise. It is quite clear that the jurisdiction is given to each Commander-in-Chief respectively, and to each exclusively, over his own army, and this whether the army be employed "in the territories of the

Company or elsewhere," as it is expressed in Sec. 10. A Bengal Commander-in-Chief never would assume, under this clause, to hold Courts-Martial over Bombay soldiers under the command of the Bombay Commander-in-Chief, nor *vice versâ*. So long, therefore, as the army of the Presidency remains under the orders of its own Commander-in-Chief no possible question of jurisdiction can arise. But it is evident that the Supreme Government, in the exigence of the public service, may withdraw any portion of the army of one Presidency and place it temporarily under the authority of the Commander-in-Chief of another Presidency; or it may place a combined army, composed of portions of the three Presidency armies, under the separate command of an officer not a Commander-in-Chief, and this army may be employed either in foreign service or in territories unannexed to any of the Presidencies. The question then arises as to how the soldiers composing this combined army are to be tried, and how the proviso in Sec. 9. is to be applied to this new set of circumstances. To take the last case first, that of a portion of a Presidency army, say the Bombay army, put under the separate command of an officer not a Commander-in-Chief, and sent on service *extra fines* of any of the Presidencies. From what has been said above, it is clear that the authority to try the soldiers of this army can only emanate from one of the three Commanders-in-Chief: it is also clear, that as the army, by the hypothesis, is not within the local jurisdiction of any Presidency at all, the authority of no other Commander-in-Chief but that of the Commander-in-Chief of the Presidency to which the portion of the army belongs can be referred to as a legal source for instituting a Court-Martial; and the conclusion follows, that the Commander-in-Chief of that Presidency is the only authority designated by the Legislature.

The second supposed case was, that a portion of the Bombay army is placed temporarily under the command of the Bengal Commander-in-Chief; and the question then arises as to which of these two Commanders-in-Chief is to institute the Court Martial. This will be found to depend upon the meaning to be given to the words in Sec. 9, "officer or soldier of the said Company of or belonging to such Presidencies," "or any such Presidency," as it is expressed more clearly in the previous Act, 4th Geo. IV.

If the words "of and belonging to" the Presidency designate the Presidency to which the army in fact belongs, the authority to convene the Court-Martial is vested in the Commander-in-Chief of that Presidency: if, on the other hand, they mean the Presidency where the army happens temporarily to be serving, the authority is vested in the Commander-in-Chief of the latter Presidency. The terms used cannot comprise both Commanders-in-Chief, so as to give them a concurrent jurisdiction, as is evident from the reason alleged above in a similar case, and from other provisions which I will mention presently. And upon a careful survey of all the provisions of the Act, and of the various objects in view, I conceive that the Legislature has clearly denoted that the Commander-in-Chief of the Presidency to which the offender belongs is the exclusive authority to institute a Court-Martial for his trial.

For, in the first place, the Act itself (Sec. 3.) has taken the clear distinction between the Presidency to which the offender actually belongs, and that in which he is temporarily serving, and therefore gives a legislative explanation of the terms "of and belonging to the Presidency."

Secondly, It is evident that the main object of the Act, viz. the maintenance of military discipline, can be effectually secured, in whichever of the two Commanders-in-Chief the authority is vested; but a variety of provisions seem to shew that the secondary object of the Act, viz. the security intended for prisoners at their various trials, can only be attained by construing the words in question according to their ordinary and natural import, and not by giving them any strained extension.

Thus, Sec. 13. provides, that when prisoners are sentenced to death by a Court-Martial, the Commander-in-Chief of the Presidency to which the offender shall belong, instead of causing such sentence to be carried into execution, may order the offender to be transported as a felon.

Here is a power of commuting punishment,—the power residing exclusively with the prerogative in England,—delegated to the Commander-in-Chief of the army to which the prisoner belongs. It belongs to such Commander-in-Chief confessedly in the great majority of cases. By what construction, then, can it be made to appear that this delegated authority is transferable to another? It is evident that this transference of the power to remit punishment might operate very injuriously to the

offender. In the army to which he belongs, and where he may have been serving for a number of years, circumstances may be known and brought forward which might have great weight with his Commander-in-Chief towards commutation of a sentence; but if the temporary service of a few days in another Presidency is to place his fate in the hands of another officer to whom the same grounds for exercising a merciful discretion are not readily presentable or available, it might make all the difference between life and death of the prisoner.

Again, by Sec. 26., another provision in behalf of prisoners is laid down, to the effect that the original proceedings, sentence, &c., of all General Courts-Martial shall be transmitted to the Judge Advocate General of the army in which such Court-Martial is held, and the offender, on demand, is entitled to a copy. How important an enactment this is for the benefit of prisoners is readily apparent; and the present case affords an apt illustration of the desirableness of a clear rule being established as to what Judge Advocate General, and what army, the clause applies to. For although it now appears on the return that the General Court-Martial was held under the authority of the Bombay Commander-in-Chief, the prisoner was never able to obtain from the office of the Bombay Judge Advocate General a copy of the proceedings.

For these reasons I am of opinion that the Legislature has clearly denoted its intention to vest the jurisdiction over the Company's armies in the Commanders-in-Chief of these armies respectively; that the Commanders-in-Chief, with respect to those armies, being invested with the functions exercised by the Crown in England over the English army, in such wise as to render them incapable of being mutually interchangeable, these functions, which are created for the benefit of prisoners, are not to be construed as transferable on any temporary change of service which the members of the army of any one of the Presidencies may be called upon to undergo. The Legislature, indeed, seems to me to have spoken so strongly on this point, that I should not have thought much question could have been made upon it, if I were not aware that a learned opinion had been given in England putting forth a different construction.

That opinion, it is true, proceeds upon the interpretation of another

clause, Sec. 2., which contemplates a special class of crimes, and as to which a different construction may be applicable. But even in that case I should conceive that the same construction should be applied as is applicable to Sec. 9.; and it is impossible to help perceiving that, in the opinion alluded to, a most important provision in Sec. 3. is altogether thrown aside, which is a mode of construction never permissible, except on a total failure to reconcile the rejected clause with the other provisions in the Act. And it is possible that, if that opinion should ever form the subject of judicial consideration, it may be held that the words there relied on,—"under his command,"—as so positively denoting the Commander-in-Chief of the Presidency where the offender happened to be serving, are not necessarily applicable to that officer, but to the immediate antecedent in the clause, viz. the officer to whom the warrant is to be directed: and, in point of fact, in the precedents of the warrants of the Crown to Commanders-in-Chief, authorizing them to delegate their power to hold Courts-Martial, and from which such words appear to have been introduced into this Act, it will be seen that the words "under his command" do not refer to the Commander-in-Chief issuing the warrant, but to the officer to whom it is directed: see the warrant to Major-General Dundas from his late Majesty Geo. III., Military Law, 306.

If, then, the conclusion as to the first question be, that the Legislature has placed the Commander-in-Chief of the armies of the several Presidencies in the same position with respect to jurisdiction over those armies as the Crown exercises over the British forces, and that this jurisdiction so vested in each Commander-in-Chief attaches upon the members of the army wherever they may be temporarily serving, it remains to be considered in what mode the power of delegating the authority to convené Courts-Martial is to be exercised.

Now, as to this mode, nothing appears to be laid down in the Act or in the Articles of War, and no question appears to have been raised upon it, except as to the officer to whom the Commander-in-Chief should direct his warrant. Sec. 9. contains the authority to delegate, but expresses no mode whatever: it simply says that "the Commander-in-Chief shall have the power of appointing, or authorizing the appointment of, Courts-Martial for the trial of any officer or soldier, &c."

With respect to the class of cases mentioned in Sec. 2., it is expressed that the officer to whom the warrant is to be addressed must not be below the rank of a field-officer; and as this provision occurs so frequently in military documents, it may be taken, possibly, to exist as a restriction on the authority to delegate, which is conveyed absolutely in Sec. 9. It has been before shewn that the Commander-in-Chief, under Sec. 2., is not, by the strict grammatical meaning of the words there used, restricted to addressing his warrant to officers who are under his command. There are no fetters, therefore, constituted by the Act or the Articles of War, as to the mode in which the Commander-in-Chief should delegate his authority. To effectuate the objects of the Act, he is called upon to do it in some way or other; and in a well-regulated, harmoniously-conducted service like that of the East-India Company, it would seem to depend on mutual arrangement, and the rules of military etiquette, to ascertain the mode in which the three Commanders-in-Chief should severally delegate their powers. It possibly was not contemplated by the Act that the contingency raising these questions as to clashing jurisdictions would arise, or that portions of the army of any of the Presidencies would be transferred temporarily from one to another. But when the public service calls for such an arrangement, it lies with the military authorities to expedite it, by enabling the provisions of the law to be carried into execution in the most available manner.

It is true that Sec. 10. points out that, "for bringing offenders to justice, it shall be lawful for Her Majesty to grant her warrant to the persons hereinbefore mentioned (Commanders-in-Chief being amongst those persons) for convening and authorizing any officer under their respective commands, not below the rank of a field officer," to convene Courts-Martial; and as this Section follows the provision which vests the authority to hold Courts-Martial in the Commanders-in-Chief, it would seem at first sight to indicate that the Commanders-in-Chief could only delegate their authority to officers under their actual command, and therefore that the mode of delegating their authority is specifically pointed out and limited.

But on examining this clause more closely, it seems clearly to result, that it does not apply to Commanders-in-Chief at all, and that it only

refers to those cases wherein Her Majesty is competent to issue a commission or warrant, which cases have been already pointed out. The clause itself will be found to exist almost in the same terms in the original Act, 27th Geo. II. c. 9. s. 2., and it clearly does not apply to Commanders-in-Chief there, for the authority is vested in the latter officers absolutely in a clause subsequent to that, pointing out those to whom the King may direct his warrant; and the term "respective commands," which has run through the different Statutes, clearly refers, in the original, to the Governments of the different Presidencies. In the course of transcribing the different Sections, on new Acts being passed, the original proviso has been dislocated from its original position, where the meaning of the Legislature is obvious; or rather, in the later Acts the proviso has been followed by an amplification of the preceding clause, in a manner not uncommon in English law-making, in which additional words do not always aid in explaining the sense, and thus the original non-relation of the clause to the proviso has become obscured. It would appear that the view I take of the power of the Commander-in-Chief over Courts-Martial of the Company's forces resting solely on the parliamentary enactment, and not on any warrant derived from Her Majesty, is confirmed by the course adopted by those whose duty it is to advise the Crown at home on those matters; for in point of fact I believe the Commander-in-Chief holds no warrant from Her Majesty for holding Courts-Martial over the Company's forces, but only over those of the Crown.

There is nothing, therefore, in the Act to prevent the Commander-in-Chief of the Presidency from delegating the jurisdiction vested in him over the Presidency's army, wherever that army, or a portion of it, goes, to any officer whatever, whether under his command or not. If it is necessary, according to the rules of the army, that the officer to whom a Commander-in-Chief directs his warrant should be under his command, possibly an officer put into temporary command of a portion of such Presidency's army may be considered, with reference to the provisions in the Mutiny Act, as so far under the command of the Commander-in-Chief of the Presidency, as to authorize the latter to delegate to him his warrant. If, however, the rules of the military service present any invincible obstacle to the delegation being made in

the manner here indicated, and if the case in question is a *casus improvisus* by the Legislature, the remedy is to be found by new regulations amongst the military authorities themselves, or by a new Act of Parliament.

It now remains to apply the conclusions which have been arrived at as to the facts of the present case; and it will be evident, that whatever difficulties may exist as to the details in carrying the Act into execution in certain special cases,—difficulties having reference more to the rules of the army than to ambiguities raised by the Statute itself,—a clear rule presents itself for deciding on the validity of the several grounds on which the authority of the Governor of Scinde to hold and confirm this Court-Martial has been based.

First of all, it was contended that Sir Charles Napier, as Governor of Scinde, had power to confirm this Court-Martial, and Sec. 2., and the 92d Article of War, were referred to. But it was seen, early in the discussion, that those clauses had reference only to a special class of crimes, namely, to crimes not of a military nature; and accordingly, as the crime in question was a military crime under Sec. 16., the above-mentioned clauses were wholly inapplicable. The incautious use of the word "Governor" in Article 92. was very probably the cause of the error that has been committed in this case, and may be very well conceived to have misled a military man, when we find even lawyers puzzled at it. The term itself does not occur in the corresponding Section of the Act, Sec. 2., and no conceivable case can exist in India wherein a Governor could have authority to hold such a Court Martial. If none of Her Majesty's forces were employed under the Presidency, then, indeed, a different authority to the Commander-in-Chief might be invested with power to institute Courts-Martial, but it would not be the Governor, but the Governor in Council under Sec. 9. The truth seems to be, that the word "Governor" has been inconsiderately copied from the corresponding Section of the English Articles of War, in which it is significant and effective.

It was then suggested that Sir Charles Napier might hold a separate warrant from Her Majesty, but this it has been shewn it is not competent to Her Majesty to grant, except by virtue of a fresh Act of Parliament.

Another basis for Sir Charles Napier's authority might be conceived to exist in Art. 91., which enables the Commander-in-Chief of an army in the field, "for the prompt and instant suppression of all irregularities and crimes committed by the troops," to deal with the case summarily on the spot; but this Article so clearly refers to crimes demanding instant punishment and example, and what is termed, I believe, in the army, Drum-head Courts-Martial, that no lawyer for an instant could refer proceedings on a crime like the present to that Article, and accordingly it was not even mentioned in Court.

I have thus disposed of all the different authorities to which Sir Charles Napier's power can be referred, exclusive of the warrant derived from the Commander-in-Chief of the Bombay Presidency; and I have done so, because it would appear from these proceedings that one or other of such authorities was relied on in point of fact, and it therefore was highly desirable, with a view to the future, to lay down the undoubted rule with respect to them.

But when the question is looked at solely in reference to Sir Thomas Macmahon's warrant, it is evident that the power there delegated has not been pursued, and that the sentence pronounced without the confirmation required by the warrant was not a legal sentence, on which execution could pass. Directly this fact appeared on the face of the proceedings, it only remained to be considered whether the prisoner should be discharged at once, or remanded for the purpose of his being made forthcoming for a new trial, as he might be when a miscarriage of the first had taken place through irregularity, or for the purpose of enabling the Commander-in-Chief of the Presidency to deal with and confirm the sentence, if he should think fit to do so. The latter, however, it was intimated was not in the contemplation of the Commander-in-Chief; and under the circumstances of the case, as the prisoner is on the strength of the Bombay army, and therefore amenable to the military authorities, no end of justice seems to be attained by keeping him any longer in custody: he may therefore be discharged.[1]

[1] In consequence of this decision an amended Indian Mutiny Act was immediately passed; see Sessions of 1844: but a number of puzzling questions still remain on the subject.

No. XIV.

RAMCHUND HURSAMUL, TRADING AT BOMBAY UNDER THE NAME AND FIRM OF TARRACHUND RAMCHUND.

versus

HENRY HARRINGTON GLASS.

14*th June* 1844.

A RULE had been obtained in this case calling upon the defendant to shew cause why a feigned issue should not be raised in the terms of Regulation XXI. of 1827 (Bombay Regulation), to ascertain whether certain opium of the plaintiff, which had been seized by the defendant as the Collector of Sea Customs, was duly seized or not.

Le Messurier, A. G. shewed cause, and contended that no feigned issue could be ordered, as the Regulation in question was not legal, never having been registered in the Supreme Court. He contended, secondly, that as the act of the defendant related to revenue, the jurisdiction of the Court was ousted under the 21st Geo. III. c. 65.

Dickinson, contra, cited the 53d Geo. III. c. 155. s. 98. 99.; Legislative Act VII. of 1841; *ex parte Owst,* 9 Price, 117; *ex parte Taylor,* 3 Younge and Jer. 91.

Judgment of the Honourable MR. JUSTICE PERRY.

This is an application framed upon Bombay Regulation XXI. of 1827 against the Collector of Sea Customs, in order to recover sixty-one maunds of Malwa opium, which it is alleged have been illegally seized by the Superintendent of Police, and delivered over to the charge of the Collector.

The Regulation in question enables the police authorities, upon information on oath of any opium having been smuggled, to issue a search-warrant, break doors, &c., and seize such opium; and after information has been given to the Collector of Sea Customs of such seizure having been effected, the opium is to be considered as under his charge, and may be confiscated by him after a certain time, if no claim is made.

The Regulation goes on to provide, that if the owner make claim to the opium, and prove, by suit instituted in the Court having jurisdiction in the case, that the full amount of customs has been paid, and the opium legally imported, the articles seized shall be restored.

The subsequent clause enacts that the proper Court of Jurisdiction in such cases is, in the Mofussil, the Magistrate's Court, if the opium does not exceed Rs. 500 in value, and the Zillah Civil Court when it does exceed that amount: in the Presidency, the Court of Petty Sessions for the smaller sum, and the Supreme Court for sums of larger amount.

The Regulation does not state what species of suit is to be instituted in the Supreme Court in cases within its jurisdiction; and as there is no suit at the common law by which judgment can be passed for the delivery of the specific articles claimed, the complainant has availed himself of the express provision in this Regulation, and has called upon the Collector to shew cause why a feigned issue shall not be ordered, to try whether the opium has been legally imported or not: and if this Court has jurisdiction to hold plea of the matter, a feigned issue seems the most appropriate and economic form of procedure that can be adopted.

But this application is opposed altogether by the *Advocate General*, irrespective of the merits, on two grounds, viz.

1st. That this is a matter of revenue, and therefore that our jurisdiction is excluded by the terms of our Charter, and by the 21st George III. c. 65. s. 8.; and, secondly, that we have no power to order a feigned issue, because the Regulation in question is void, from never having been registered in the Supreme Court.

If the first of these objections is well founded, it is unnecessary to consider the second; because, if we have no jurisdiction in revenue matters at all, it is wholly immaterial whether the Regulation in which a particular species of suit or proceeding is pointed out be void or not. If, on the other hand, the clause in the 21st Geo. III. c. 65. s. 8. is not in operation, so as to prevent this Court holding jurisdiction in a plea of this nature generally, it will become necessary to inquire whether the Regulation establishing this particular form of proceeding has any validity in law.

Now, in approaching a question as to the jurisdiction of this Court, I am quite alive as to the temper of mind with which the inquiry should be conducted. The maxim, once so familiar in Westminster Hall, "*boni est judicis ampliare jurisdictionem*," is no longer, I apprehend,

generally received. And although it must be the desire, not only of every right-minded man generally, that in a country governed by law the legal tribunals should afford a remedy for every wrong; still the paramount duty of the Judge consists, in every case, in strictly conforming himself to the limits which the law has set upon his jurisdiction, and not to transcend them one tittle, however grievous the outrage, and however much his interposition in the particular case may recommend itself to his notions of natural justice.

In the present instance, however, it would be a case of morbid sensibility to shrink from exercising the jurisdiction in question, on the ground that it was contrary to the intention of the Legislature; for, first of all, we know historically the reasons on which the clause in the 21st Geo. III. c. 65. was introduced, namely, to prevent the Supreme Court of Calcutta from bringing within their jurisdiction the whole of the civil service, and their employees, for acts done in the collection of the revenue throughout Bengal, Behar, and Orissa, and thus engrossing to themselves the chief civil function of an Asiatic Government; and, secondly, we see clearly that the local Government never dreaded the interference of the Supreme Court in a matter like the present, because the Bombay Regulation itself is a voluntary declaration that the Supreme Court is the proper tribunal where a question above Rs. 500 in value arises at the Presidency.

To me, therefore, it seems very doubtful whether the words in the 8th Sec. of the 21st Geo. III. c. 65. (which words, and not the more restrictive ones in our Charter, afford the rule to our Court, according to *Vencata Runga Pillay* v. *The East-India Company*, 1 Strange's Madras Cases, 174, confirmed on appeal), namely, "that the Supreme Court shall not have jurisdiction in any matters concerning the revenue, or acts done in the collection thereof," refer to any thing more than the land revenue; and whether all that was contemplated by the Legislature would not be effected by taking "revenue" to mean only that large and main source of the national supplies, with which alone any interference by Her Majesty's Courts of Justice was to be deprecated. Customs revenue in India is not to be compared for a moment in point of importance to the corresponding branch of revenue in England, and not the least reason exists for extending further privileges to officers in this

country, in the collection of such Customs revenue, than exists with respect to similar officers in England.

But the decision of the present point does not turn upon any subtle distinction as to what was meant by the term "revenue" in the 21st Geo. III. c. 65., but upon the express words of the subsequent Act of the Legislature, viz. the 53d Geo. III. c. 155. s. 98. That Act confers upon the local Indian Government, for the first time, the power of imposing duties and taxes upon the inhabitants at the Presidencies, but at the same time that it throws these new obligations upon the British and others there residing, it also confers upon the latter the accompanying rights of suing in the Supreme Court for any illegal acts committed against them, upon any matter or thing arising out of the new Revenue Regulations to be imposed by the local Government.

The words of clause 99. are, "That it shall be lawful for all persons whatsoever to prefer indictments, and maintain suits in the Supreme Court for enforcing such laws and regulations, or for any matter or thing whatsoever arising out of the same, any Act, Charter, or other thing to the contrary notwithstanding."

These words are so very general, that I have not the least doubt they give a party aggrieved a remedy against any and every revenue officer for illegal acts done under such Revenue Regulations, although perhaps, without such provision, the previous enactment in the 13th Geo. III. c. 63. might have prevented the remedy from being brought in the Supreme Court.

If this is so, and if an action of some sort is sustainable for an illegal seizure of opium, the second question arises whether the particular form of suit now adopted, and framed on the Bombay Regulation, can be maintained. This almost wholly depends upon the validity of the Bombay Regulation, either taken by itself absolutely, or as confirmed by the Legislative Act VII. of 1836. The CHIEF JUSTICE is of opinion, on the authority of the decision in the Stamp Case at Calcutta, in 1827, 16 Oriental Herald, and of a decision of the same Judge in 1830, Bignell, 1, that the Regulation is invalid for want of registration in the Supreme Court; but he is inclined to think that that deficiency has been supplied by the Legislative Act of 1836. I regret much that I am unable to subscribe to either of these views, as I conceive that the

Regulation of 1827 was amply valid, in virtue of the sanction of the Court of Directors, and their approbation. But if I am wrong in this view, and if, according to law, the Regulation should also have been registered in the Supreme Court, I am undoubtedly of opinion that the Act of the Legislative Council does not amount to a rehabilitation of it, but has left the Regulation with all its original infirmity upon its head, merely providing that acts done in conformity with its spirit shall not be questioned in Courts of Law.

It is very difficult to say, in point of fact, what the Legislative Act VII. of 1836 actually does mean. It is very short, and still more obscure: it contains no preamble, nor any clue as to what the evils were which were to be provided against. It undoubtedly does not mean all that it says in terms, because it provides that the legality of acts under certain Regulations (this Regulation being one of them) shall not be questioned in any Court of Law; and it certainly could not have been intended by the Legislative Council that acts of murder, or of trespass, committed by revenue officers, should receive this immunity. But if the Act cannot be construed to mean all that it says, I think it is equally incompetent to us to hold that it means more than it says; and I conceive the only possible construction of it is, that it was an Act passed *ex majori cautelâ*, in order to prevent any acts, properly done under the various Regulations, being questioned in Courts of Law, certain of these Regulations being open to objections on the ground of their not having been confirmed at home; and this very Regulation being open to the objection which the Judges of Calcutta took in the case of the Stamp Act, of its requiring registration in the Supreme Court.

As, however, the CHIEF JUSTICE and myself arrive at the same ultimate conclusion, though by different roads, namely, that the remedy pointed out by the Bombay Regulation is open to the party grieved, it would be unnecessary to go further; and I should be unwilling to set out at length the grounds on which I have formed my opinion, if I did not think it probable that the satisfactory course would be adopted of taking the opinion of a superior tribunal, and of thus affording the Court here a clear rule for the future.

The Judges at Calcutta, viz. SIR CHARLES GREY, SIR J. FRANKS, and SIR EDWARD RYAN, have undoubtedly laid down, in very strong

terms, that Regulations imposing duties at the Presidency, and containing the proper machinery for enforcing them, require to be registered in the Supreme Court. This decision was first made by them when the Stamp Duties Regulation was under discussion at Calcutta in 1827, and was again affirmed by them incidentally in 1830, in *Doe dem. Peareemony Dossee* v. *Bissonath Bonnerjee*, Bignell, 1. To such an authoritative exposition of the law, in any ordinary case, it would be my duty to bow; but on an occasion where it seems possible that the opinion of the Superior Court may be obtained, it may appear not presumptuous that I should endeavour to urge what appears to me to have been the clearly opposite intention of the Legislature, and which intention, if it can be plainly established, it is our undoubted duty to carry out, notwithstanding one or two conflicting decisions.

In order to inquire into the necessity for the registration of a Revenue Regulation in the Supreme Court, it is necessary to look back to the origin of the practice. This is to be found in the 13th Geo. III. c. 63. s. 36., which enabled the Governor-General and Council to make Rules and Regulations for the good order and civil Government of the Presidency of Fort William, but the same were not to be valid until registered and published in the Supreme Court, with the consent and approbation of the said Court. This was the first delegation of any thing like legislational power to the Company by the Imperial Parliament; but these powers were dealt out to them so charily, that they will be found not to exceed, in point of magnitude, those which were incidental to the incorporation of any petty company whatever. A corporation of tin-plate workers might enforce good order and government in their trade by rules and bye-laws enforceable by fine; and the Company, having undisputed government over thirty or forty millions of subjects, could do no more. See *Clarke's case*, 5 Rep. 64. Accordingly, some years later it was found necessary to extend the powers of the Company, and they were enabled, for the purpose of preserving good order in the settlement, to go so far as to enforce their Rules and Regulations." by public or private whipping;" such Regulations, nevertheless, to be subject to registry in the Supreme Court; See the 39th and 40th Geo. III. c. 79. s. 18. In point of fact, these narrow and wholly insufficient powers for the government of a great country were wholly framed in accordance

with views of corporation law. Charters incorporating different companies will be found to contain exactly similar provisions for making bye-laws, to be enforced by fine or moderate corporal punishment; and the mode adopted of opposing a check to the establishment of bye-laws repugnant to the general law of the land is also precisely copied from a prevailing practice in England as to corporations.

By early Statutes, the 15th Hen. VI. c. 6., and the 19th Hen. VII. c. 7., corporations were directed to enter their bye-law of record before "Justices of the Peace, or Chief Governors," and to have them examined by the Chancellor or Judges; and it appears that the ordinary practice was for the Judges to sign such regulations, as a matter of course, on circuit, without thereby giving any legal validity to the bye-law in question. See Comberback, 222. This ancient practice, therefore, of the law, as to bye-laws enforceable by fine and moderate punishment, was imported into India when a power to make similar bye-laws was first given to the Company.

But when Parliament legislated for India in 1813, it will be seen that they had emancipated themselves from the narrow notions which they had previously entertained of the legal character of the Company. The draftsman who framed the provisions for the extended power of Government conveyed by the 53d Geo. III. c. 155. no longer betook himself to the precedents on his file applicable to ordinary corporations in England, but boldly gave the requisite powers for governing on the spot as to a distant great Government. Thus the 98th Section of that Statute gave the local Government the power of imposing duties and taxes on all persons within the jurisdiction of the Supreme Court; but as these were large and novel powers to be exercised over British subjects, by a new authority, it was requisite, in a constitutional view, that an efficient check should be placed upon the local Government against any arbitrary taxation, and this check was constituted by subjecting every Regulation imposing such tax to the sanction of the Court of Directors and the authority of the Board of Controul: these three authorities,—the two latter, namely, and the respective Governor in Council,—constituted the sole governing powers to whom the Legislature had attributed the Government of India. It is scarcely to be anticipated, therefore, that in constituting an Act like the one in question the Parliament should

have committed the powers of legislation to any other hands than to the actual responsible Government; and accordingly those authorities only are mentioned as empowered to take any share in the establishment of laws. But the argument is, that although, true it is, Parliament has given the local Government the power of imposing taxes on the community at the Presidency, still, if the Regulations imposing such taxes contain any provisions for enforcing the collection of the same, such provisions are regulations for the good order and civil government of the Presidency, and therefore they fall within the meaning of the earlier Statute, and must be consented to, and approved of, by the Judges in the Supreme Court, before they can be passed into law.

The direct consequence of this conclusion is, that any Tax Regulation, which the whole united Government of India might think it indispensable for the interest of the country should be established, might be defeated by any one Judge who happened to be sitting alone; for the reasoning of SIR EDWARD RYAN in the Stamp Case is, I think, incontrovertible to shew that the first Statute, the 13th Geo. III. c. 63., gave legislative, and not mere ministerial powers to the Judges, and empowered them to reject an Act if they did not admit of its expediency.

In other words, the powers of legislation conferred by the Imperial Parliament, and guarded by various checks, imposed in express terms, were all to be defeated by a construction admitting of the *veto* of a single individual, of whom no mention is made in the Statute.

This conclusion seems to me so monstrous, that it at once shews that the reasoning upon which it is founded must be erroneous.

It is said that "the imposition of a tax, and the law by which it is to be enforced, are easily distinguishable from each other;" but I confess that I am unable so to distinguish them. If a tax is imposed by competent authority, it can only be by a law, and a law is not an effectual law unless it carries its own sanction with it. An enactment that the inhabitants of Bombay shall pay customs if they choose is no law at all; but a simple enactment that they shall pay customs is an imperative command, capable of being enforced by the same authority which had power to make the law. In some systems, such as the Roman, there are what is called laws of imperfect obligation, where no sanction is contained in the enactment for carrying its provisions into effect;

but in the English system a much sounder principle prevails, and whenever a law enjoins a particular course of action the party is punishable if he fail to comply with the provisions.

I am quite unable, therefore, to distinguish the power of imposing a tax on a British community from the incidental powers which are necessary for carrying the first power into effect. The grant of the first necessarily involves the latter, on the well-known principle by the grant of any thing "*conceditur et id sine quo res ipsa uti non potest.*"

If, therefore, the 98th Section gives the power to the local Government, under the checks above-mentioned, of imposing taxes on the British community, without the necessity of registration in the Supreme Court,—and so much is admitted,—it follows, from the above principle, that all the incidental powers for carrying out the legislation are inseparably bound up with the former grant, and therefore, like that, cannot require registration; and, remarkably enough, it will be seen that both SIR CHARLES GREY and SIR EDWARD RYAN make use of this argument, in terms to establish that the necessary powers which they held were accorded to the local Government by the grant of legislation.

It appears to me, therefore, on the above grounds, that the registration required in the Supreme Court only applied to those Regulations to which express reference was made in the early Statutes, viz. to those simple powers of making bye-laws enjoinable by fine and moderate corporal punishment, which were accorded to the Company in common with most other corporations; but that, when larger powers of legislation were granted to them, a much more efficient check was supplied than any which could be exercised by the Judges of the Supreme Court. SIR EDWARD RYAN has shewn very forcibly that the Judges have not the requisite information before them for ascertaining what the wants of the community may be as to any particular law: their time is fully occupied in studies of a different nature; and even if they had time to devote to inquiries of a political character, it would be most inexpedient to place them in a condition which would inevitably bring upon them the imputation, either of yielding to Government solicitation on the one side, or of stooping to obtain a little transient popularity on the other. Indeed, the expediency of separating judicial and legislative functions as much as possible has been so long felt by all sound

thinkers, and the evils caused by the ill-defined functions of the Supreme Court and local Government at Calcutta were so immediately before the eyes of the Legislature in 1813, that I cannot bring myself to believe that they intended to subject the powers of legislation committed to the local Government to the controul of the Supreme Court. If they had no such intention, it is manifest that the astute reasoning and subtle distinction by which the clause in a previous Statute is made to extend to other objects, not contemplated by the Legislature, can have no place, but must be rejected.

If, then, the Regulation in question was valid *ab initio*, so soon as it received the sanction of the Home Government, a further question, perhaps, arises (although it was not made at the Bar), whether this particular proceeding in the Supreme Court could be authorized. The proceeding enjoined is an action *in rem*: no damages would be recoverable for the improper seizure, and nothing is said about costs. I have said before that at common law we have not got such a remedy for the recovery of the article in specie (although *detinue* approaches to it); and it might be objected that the local Government could not frame a new form of action for the jurisdiction of the Queen's Court. But, on the whole, I think this objection not sustainable. According to the view of the CHIEF JUSTICE and myself, this Court has jurisdiction generally, under the 53d Geo. III. c. 155. s. 98., for illegal acts committed under Revenue Regulations at the Presidency. It has been already shewn that the Imperial Legislature, in delegating to the local Government the power of imposing taxes, must have delegated, also, all necessary powers for carrying the object contemplated into effect; and as to afford a remedy for any injustice committed by their subordinate officers may be said to be a necessary power towards carrying the Act effectually into operation, I think that the local Government may be held to have had the power to establish this particular remedy in the Supreme Court. At all events, if the true construction should be that they had no power in any way to limit the jurisdiction of the Court in respect of the party aggrieved, such jurisdiction being founded on the 53d Geo. III. c. 115., still I think it is not competent to the servant of the Company to take this objection. The proceeding is a much more beneficial one for them, and the only effect of giving way to it would be to allow an action at

common law to be brought, with all its incidents of arrest, cost, and vindicative damages.

Upon the whole, therefore, I am of opinion that no impediment exists towards carrying out the provisions of the Bombay Regulation XXI. of 1827, and this conclusion appears eminently in harmony with the justice of the case; for if this seizure had taken place in the Mofussil the claimant would have obtained redress there, either summarily or in the Zillah Court, the Regulation being confessedly valid in the Mofussil, whether registration is required in the Presidency or not. But if the arguments of the *Advocate General* are correct, if the present plaintiff cannot get redress in the Supreme Court, he can get it nowhere. It is said that another remedy is afforded by the 21st Geo. III. c. 70. s. 22., which enables the Governor in Council to decide, as a Court, on all offences and extortions committed in the collection of the revenue. But it is needless to say that no such Court exists for this purpose now; and although, I believe, in Bombay the senior Magistrate of Police has some jurisdiction as a judge in local revenue matters, it is quite clear that he could not exercise jurisdiction in cases of this nature, for he is the very party who is to originate the series of acts, the legality of which is to be determined judicially.

It is clear, therefore, that this is the only Court where justice on the subject-matter can be rendered; and this makes quite clear why it was that the 53d Geo. III. s. 98. enacted that "all persons whomsoever might sue in the Supreme Court for any matter or thing whatsoever arising out of the laws and regulations" to be passed by the local Government.

As the effect of our decision is to overrule the plea to the jurisdiction, I think that the Collector should be called upon to answer the affidavits as to why a feigned issue should not be awarded.

The *Advocate General* then stated that his affidavits set out the facts of the opium having been seized in consequence of information given on oath to the senior Magistrate of Police, and contended that if the complainant sought to recover back the articles, it lay upon him to prove that the customs duties had been duly paid.

Dickinson, contra, contended that the Collector should go much

further, and state who it was that gave information, and whether he believed that the opium was smuggled or not.

THE COURT held that the words of the Regulation threw the *onus probandi* entirely on the claimant; and although such proof might sometimes be very difficult to bring forward, still it was exactly the same course of procedure as a party under similar circumstances would have to adopt in England, the Customs Act, the 6th Geo. IV. c. 104., throwing the burden of proof entirely on the claimant who should desire to contend that his goods had been improperly seized. An issue was therefore directed to ascertain whether the duties had been paid, and the opium in all respects lawfully imported.

At the conclusion of SIR ERSKINE PERRY'S judgment SIR HENRY ROPER stated as follows:—

Having fully declared on Wednesday last the grounds on which I held that this Court has jurisdiction of the matter in question, I shall now but very briefly allude to the slight difference of opinion between SIR ERSKINE PERRY and myself upon the subject. He holds that registration of Regulations for collecting a tax, imposed under the 53d Geo. III. c. 155. s. 98. 99., was unnecessary, because the power to impose the tax was given; and in his view the tax could not be imposed without prescribing means for collecting it. SIR CHARLES GREY and SIR EDWARD RYAN thought otherwise; and it appears to me, that, for the imposition of a tax by the Government at Calcutta or at Bombay, it was not absolutely necessary that the Regulation imposing the tax should also prescribe means for collecting it, since the Statute gave jurisdiction to the Supreme Courts, in which the tax might therefore be enforced.

If the Regulation XXI. of 1827 be in any respect void for want of registration in the first instance, and for want of confirmation under the law passed at Calcutta, Act VII. of 1836, we should still fall back upon the general jurisdiction given by the Statute 53d Geo. III. c. 155. If what is directed to be done in this Court under the Regulation XXI. of 1827 is to be considered "an act" under the Regulation, I should hold that part of the Regulation which gives such directions amply confirmed by Act VII. of 1836. But that enactment is so obscure, and in many respects so imperfect, that I am unwilling to give any opinion

regarding it; and as the general jurisdiction is given by the Statute, I do not see that any decisive opinion is absolutely required, even with regard to this motion; for the general question as to jurisdiction having been determined against the *Advocate General*, both parties appear now to go upon the Regulation as valid.

There is a point which has not been raised, unless remotely by an allusion I made to another matter. The general words of the 21st Geo. III. c. 70. s. 8. might be held to preclude jurisdiction in all matters concerning the revenue, except such as arise under the 53d Geo. III. c. 155. If the opium duties existed before that Statute was passed, it might have been contended that jurisdiction in matters concerning them was excluded; and on the other hand it might have been argued, that, by passing the Regulation XXI. of 1827 avowedly under the 53d Geo. III. c. 155., jurisdiction was conferred.

No. XV.

BUCHOOBOYE
versus
MEWANJEE NUSSERWANJEE.

8th August 1844.

[*Cor.* Sir Erskine Perry, J.]

This was a suit for restitution of conjugal rights.

Dickinson, on an allegation of faculties, moved for a grant of alimony.

Le Messurier, A. G., contra, contended, that although the parties to this suit, who were Pársís, were generally amenable to English law, there was a broad distinction in many respects between the people of this country and of England. Asiatic females were not *sui juris*, and not, therefore, in a position to demand alimony.

Judgment of the Honourable Sir Erskine Perry.

This is a suit brought by a Pársí female for the restitution of conjugal rights, and an interlocutory application is made by her, after the coming in of the impugnant's answer, for temporary alimony. She alleges that his income amounts to Rs. 150 per month, made up, first, of wages as godown keeper Rs. 35; secondly, house in Hummun Street,

worth Rs. 13,000; thirdly, house at Mazagon, let at Rs. 20; fourthly, cash, &c., left by his father, Rs. 18,000.

The impugnant makes an affidavit in answer to this, admitting the first item of Rs. 35 per month, denying the second, admitting the third with a qualification, and denying, also, the fourth, but that in terms rather pregnant with an admission.

But before examining into these faculties an objection which impugnant alleges against the jurisdiction of the Court must be disposed of; for he contends, first, that the principles which prevail as to granting alimony in Christian marriages do not apply to Pársís and native wives.

This objection, however, was urged so faintly that it is not necessary to expend time upon it. The case of Perozeboye Ardaseer Cursetjee having decided that this Court is open to natives for the settlement of disputes arising out of the marriage contract, and Pársís being subject to English law generally, it follows, that as a Pársí husband is liable for the debts of his wife, and absorbs his wife's property, a Pársí wife is entitled to alimony on exactly the same principles as an English wife would be if she claimed it at this Court.

The second objection is, that the marriage between the parties, though admitted by the impugnant to have taken place, is alleged by him to be now no longer subsisting, and therefore that the obligation to grant alimony ceases. The grounds which he puts forward for invalidating the marriage are two; first, want of consummation owing to refusal on the part of the wife; and second, the divorce which he has assumed to himself, and, as he asserts, lawfully, the power to pronounce.

In *Lindo* v. *Belisario*, 1 Hagg. 773, n., it was held by LORD STOWELL, after a long inquiry, that a betrothment between Jews, without consummation, did not constitute the *vinculum conjugale;* and that case is referred to in order to shew that the bar set up by the impugnant may well be looked upon as an invalidation of the marriage asserted to exist here. This is a point upon which I do not intend now to express any opinion: the Pársí law may accord with the Jewish law, or it may not; or, according with the Jewish law, the facts alleged in this case may not bring it within the same predicament as that upon which LORD

STOWELL pronounced his jugdment; and, lastly, the facts which the impugnant alleges may not be capable of proof.

But as all these are questions which the promovent has the right to have decided by this Court, and as the *factum* of a lawful marriage is admitted by the impugnant, I think the wife is entitled to alimony in the mean time, until the final decision of the Court be obtained.

With respect to the *quantum* there is some difficulty. The husband admits that he has Rs. 35. a month, and denies that he has Rs. 150; and it is clear from his admissions that he has something between these two amounts. If the wife had chosen, she might have examined witnesses to shew what his means are; but not having done so, it must be taken that she is satisfied with his affidavit.

It appears, also, from his statements, that the wife has clothes and joys to the amount of Rs. 4000, which were given her by the husband's father, and these, it is said, should be taken into account in diminishing the alimony to be awarded her. But, according to the husband, the wife has only a life interest in the joys, and if so, they are clearly not applicable as a source of support. I think, on the whole, that Rs. 20 a month should be awarded.

NO. XVI.

IN THE MATTER OF THE PETITION OF THE WIVES OF ALLOO PAROO.

17th June, 1845.

Howard presented a petition to the Court, with a view of obtaining either a recommendation by the Judges to the Crown to pardon Alloo Paroo, who was convicted last October of felony, or leave to appeal against the conviction to the Queen in Council.

Alloo Paroo, with two others, was tried at an Admiralty Sessions held in October last, as being accessaries before the fact to the burning of the Belvidere by Captain Stephenson on the high seas, and, being found guilty, was sentenced to transportation for life. Stephenson, though charged in the indictment as the principal felon, has not been tried, and the offence was stated in the indictment to be against the form of the Act of the Government of India.

The matter was gone into by counsel at very considerable length, and the objections relied on as fatal to the conviction were substantially the following:—

That as regards accessaries before the fact to felonies, Act XXXI. of 1838 extends only to accessaries to felonies under that Act, and not under any other; and consequently, that unless Stephenson's offence was within the provisions of that Act, Alloo Paroo could not be indicted under it. (See s. 36.)

That Stephenson's offence was not within Act XXXI. of 1838, because committed on the high seas, to which that Act does not extend. The 9th Geo. IV. c. 74. s. 117. (the Indian Criminal Act) comprised Stephenson's offence. provided that, at the time of committing it, he was a person who, under the first Section, would be subject to its provisions. Act XXXI. of 1838, s. 1., declares that so much of the 9th Geo. IV. c. 74. as *inter alia* relates to any person who shall set fire to, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, and as relates to the punishment of accessaries before the fact thereto, shall cease to have effect within the territories of the East-India Company. The second Section of Act XXXI. of 1838 declares that its provisions shall extend to all persons and over all places, over whom and on which the criminal jurisdiction of any of Her Majesty's Courts within the territories under the government of the East-India Company extends, but not further or otherwise. But this clause, read in conjunction with the first clause, and s. 43. of the 3d and 4th Will. IV. c. 85. (the Charter Act), which enables the Governor-General in Council to repeal, amend, or alter laws in force within the Indian territories, and to legislate generally within those territories (a power not extra-territorial), and, with the Charter of the Supreme Court, defining its criminal jurisdiction, shews clearly that it could not be the intention of the Governor-General in Council to render any part of the 9th Geo. IV. inoperative, except as to offences committed within the Indian territories. The 9th Geo. IV. c. 74. remains, therefore, in force on the high seas.

It had been assumed that Captain Stephenson was liable to be tried under the Indian Criminal Acts, rather than the English Criminal Acts relating to the same offence; for unless he was so, his offence could,

under no circumstances, come within Act XXXI. of 1838, as that Act is certainly not more extensive than the 9th Geo. IV. c. 74. Alloo Paroo, therefore, as an accessary to his felony, could not be tried under Act XXXI. of 1838.

But it did not appear on the face of the indictment whether Stephenson, at the time that he burnt the Belvidere, was or was not a person subject to the ordinary criminal jurisdiction of the Court. In point of fact, he was not at that time constructively an inhabitant of Bombay, a person in the Company's employ, or otherwise subject to the Court's ordinary civil or criminal jurisdiction; but it was necessary to determine under what Act he was liable to be tried and punished before it could be ascertained under what Act the accessary to his felony could be tried and punished; and unless this appeared by proper averments in the indictment and proof, the Court could not see that the accessary had been legally sentenced. Thus, if Stephenson, at the time he committed his offence, was a person subject to the ordinary jurisdiction of the Supreme Court, and within the provisions of the 9th Geo. IV. c. 74., the offence was punishable, both in the principal and accessary before the fact, with death, and any other sentence would be illegal; but if, on the other hand, he was not, at the time of his offence, within the class of persons to whom that Act was exclusively applicable, neither was the accessary, and both would be liable to be punished, under the 7th Will. IV. & 1st. Vic. c. 89., with transportation for life, or years, or imprisonment.

The indictment contained no averment of this fact one way or the other, and hence it was uncertain whether the sentence passed on the accessary to his felony was conformable to law, or not. It was clear that a person could not be subject to two sets of Acts for one and the same offence, and at one and the same time, depending on the mere accident of the Court in which he happened to be tried. If Stephenson had destroyed the Belvidere on his way out from England, and had been tried here, he must have been tried under the 7th Will. IV. and 1st Vic. c. 89., as not being, at the time he committed his offence, one of that class of persons to whom the 9th Geo. IV. c. 74. and the Acts of the Legislative Council are exclusively applicable; and *vice versâ*, if an Indian subject, under similar circumstances, were caught

and tried in England, he would be tried under the 9th Geo. IV. c. 27. Unless the criterion of the personal liability to either code of law be attended to, inextricable conflict must ensue.

It is understood that Stephenson had never been in Bombay but on this one occasion: hence, whenever tried, whether here or in England, for destroying the Belvidere, he must be tried and punished under the Act of William and Victoria; and the applicability of that Act to him, if tried here, could only appear by an averment in the indictment that at the time he committed the offence he was not a person subject to the ordinary jurisdiction of the Court. And as Alloo Paroo could only be tried as an accessary to Stephenson's felony by virtue of the 9th Geo. IV. c. 74. s. 7., which renders accessaries to felonies, created by any Statute then passed or thereafter to be passed, punishable in the same manner as the principal felons, the same averment, without which it cannot be ascertained how Stephenson is punishable, should, for the same reason, appear in the indictment against Alloo Paroo, as accessary. The indictment should therefore have concluded "against the form of the Statutes in that case made and provided," and not "against the form of the Act of the Government of India." *Rex* v. *Pearson*, 1 Moody C. C. R. *Radcliffe's Case*, 2 Moody C. C. R.

The above argument assumed that the Court could try Stephenson if he were apprehended and brought here; but although the Supreme Court had jurisdiction to inquire into offences committed on any part of the high seas, yet it can only do so in cases in which those offenders are persons subject to its ordinary criminal jurisdiction, as that jurisdiction is defined and laid down in the previous clauses of the Charter. The clauses, giving the Court unlimited admiralty jurisdiction as to place, conclude as follows: "Provided always, that the several powers and authorities herein given to the said Court to proceed in maritime causes, and according to the laws of the Admiralty, as herein expressed, shall extend and be construed to extend only to such persons as, pursuant to the provisions hereinbefore contained, are and would be amenable to the said Supreme Court of Bombay in its ordinary jurisdiction." The Bombay Supreme Court was established much later than the 53d Geo. III. c. 155., and it would be impossible to contend that that Act renders the above express restriction a nullity.

If, then, the Court had no jurisdiction to try the principal felon, it had none to try the accessary, 9th Geo. IV. c. 74. s. 7. The true meaning of the latter part of this clause will be discovered by comparing it with the 7th Geo. IV. c. 64. s. 9., from which it is copied.

Dickinson appeared in support of the application, but was not heard.

THE COURT, soon after consultation, intimated their impression that the conviction could be sustained. They adverted to the fact that Stephenson was in Bombay, and subject to the jurisdiction of the Court at the time he planned with Alloo Paroo the destruction of the vessel. They expressed their intention, however, of communicating with the Judges at the other Presidencies on the subject.

The *Advocate General* expressed a hope that the Court would not decide on any course without hearing him as counsel for the prosecution, and objected to the conviction being questioned after a lapse of upwards of nine months.

The CHIEF JUSTICE said, that if ten years had elapsed since the conviction, it would be no reason for refusing to hear an application to avoid it on the ground of its illegality.

Howard then applied that the petition might be filed.

The CHIEF JUSTICE—"No, it must be refused: we will take what you have said, as said as *amicus curiæ*."

Judgment of the CHIEF JUSTICE.

With respect to the alleged error in the conviction of Alloo Paroo, it appeared to me, that if any doubt existed it should be fully met and disposed of on the broad grounds of law and merits, rather than be suppressed or evaded on the score of lapse of time, or technical or otherwise unsatisfactory objections to its discussion. Though strongly inclining to the opinion that the conviction could be supported, still the arguments to the contrary had induced some doubt, founded on the positions that the principal offender, Stephenson, had been guilty, either under the 9th Geo. IV. c. 74. s. 117., or under the 7th Will. IV. and 1st Vic. c. 89. s. 6.; and the question thus seemed to be, whether, if Stephenson's offence were under either of those last mentioned statutes, a conviction upon the indictment against the accessary before the fact,

founded upon Act XXXI. of 1838, s. 24., could be valid. I saw no reason to conclude that, under such circumstances, that conviction could be valid; for it seemed to be almost conceded that, assuming Stephenson to be amenable to the jurisdiction of this Court, his offence was indictable in this country under one or other of those Acts of Parliament; whilst the matters suggested as tending to shew he was rather indictable under the Act of the local Legislature, XXXI. of 1838, appeared to me inconclusive: for I thought, and think, the fact that Stephenson was in Bombay at the time he planned with Alloo Paroo the destruction of the vessel beside the question, and does not shew that, if tried for his offence in this Court, the indictment should be under Act XXXI. of 1838. To establish that point, other matters were also observed upon in the course of the argument, but which, in like manner, appeared to me unsatisfactory and inconclusive. I have since considered the whole subject, and the result is, a conviction that the views of counsel who maintain the illegality of Alloo Paroo's conviction, however astute and ingenious, are contracted and wrong, it being apparent on broad grounds that the principal offender, or Stephenson, was amenable to the admiralty jurisdiction of this Court; and that, had he been tried and convicted here on an indictment founded on Act XXXI. of 1838, s. 24., the conviction would be unquestionable.

First, as to the strange position that this Court has not jurisdiction to try Stephenson, if brought to Bombay, because he is not a person subject to the ordinary criminal jurisdiction within the meaning of the restrictive proviso in the Charter, p. 43 of the copy printed by Cox of Great Queen Street, February 1834.

In refutation of this doctrine it would be quite sufficient to say that the contrary thereof has been maintained and acted upon by all the Judges who have sat in this Court from the time of its establishment. Shortly before my first arrival in India, Mr. Tucker, the master of a British free-trader plying between England and India, a mere bird of passage, was tried in the Supreme Court before SIR EDWARD WEST for alleged murder or manslaughter on the high seas during the voyage from England, and wholly irrespective of his having ever been in Bombay before. Several similar cases have from time to time occurred, and, more recently, M'Phun was tried and convicted under the like

circumstances; so that really it evinces some hardihood to broach such a doctrine at the present day, in opposition to authority and practice during a series of more than twenty years. The question has not been started now for the first time; for in my copy of the Charter I find MS. notes and references upon that restrictive proviso, importing that, at some former period, the question had been suggested. The position contended for is founded on the original construction of that proviso by the Judges at Bengal, in consequence of which construction the 53d Geo. III. c. 155. s. 110. was subsequently passed; and upon the idea that although the last mentioned Statute gave to the then existing Recorder's Court at Bombay the same admiralty jurisdiction in criminal matters as it also gave to, or declared to be vested in, the Courts at Calcutta and Madras respectively, yet that the Supreme Court at Bombay has not the jurisdiction, because its Charter contains the same restrictive proviso, whilst such proviso is not affected by the Statute, which was passed several years before the establishment of the Supreme Court.

As already observed, the doctrine is sufficiently overruled by the authority of Sir Edward West, and of all the other Judges of this Court from its establishment to the present day: and if such authority were insufficient, we are to recollect the point is, how the Charter of this Court at Bombay should be construed, looking at all its parts, and so that *res magis valeat quam pereat.*

In the fifth page of the edition of the Charter already specified we find a recital of the 4th Geo. IV. c. 71., containing a declaration of the expediency of establishing this Court in the same form and with the same powers and authorities as the Court subsisting at Calcutta, by virtue of several Acts, including the 53d Geo. III. c. 155. s. 110., which declared the extensive admiralty jurisdiction in criminal matters of the King's Courts at Calcutta, Madras, and Bombay. The Recorder's Court was the King's Court at the latter Presidency at the time of passing the last mentioned statute. In page 6 of the Charter it is recited, that, by the 4th Geo. IV. c. 71., power was given to the Crown to establish a Supreme Court at Bombay with the like admiralty jurisdiction as the Supreme Court at Calcutta possessed. In pages 18 and 19 of the Charter it is provided that "all powers, authorities, and jurisdictions, of what kind or nature soever, which, by any Act or Acts of Parlia-

ment may be or are directed to be exercised by the Mayor's Court, or by the Recorder's Court at Bombay, shall and may be as fully and effectually exercised by the Supreme Court at Bombay, as the same might have been exercised or enjoyed by the Mayor's Court, or by the Recorder's Court." There can be no doubt that after the 53d Geo. III. c. 155. s. 110. was passed, a man circumstanced as Stephenson would have been within the admiralty jurisdiction, in criminal matters, of the Recorder's Court. In page 51 of the Charter we find the authority of the Recorder's Court over all matters depending before it, including indictments, transferred to the Supreme Court, with a proviso that they shall not be abated, discontinued, or annulled, but be transferred in their then present condition, and shall subsist and depend in the Supreme Court, &c. Suppose a man circumstanced as Stephenson had been indicted on the admiralty side of the Recorder's Court, and the case was undetermined on the establishment of the Supreme Court, this passage in the Charter imports that the Supreme Court could, should, and would have proceeded with it; and a subsequent passage in the same page expressly empowers the Supreme Court to do so. It cannot be contended that the Court has merely jurisdiction with regard to admiralty matters of that description commenced in the Recorder's Court, and not over similar matters to be commenced, brought, found, presented, or recorded in the Supreme Court.

Looking at these passages, I have no doubt, independently of the authority of Sir Edward West and succeeding Judges, that whatever may have been originally the correct construction of the proviso in question, in the Charters of the Supreme Courts of Calcutta and Madras respectively, previous to the passing of the 53d Geo. III. c. 115., that proviso in the Charter of the Supreme Court at Bombay must either be rejected as repugnant, or the construction thereof must be such as is consistent with the exercise of admiralty jurisdiction in criminal matters by the latter Court to the same extent as was exercised by the Recorder's Court at Bombay, and is at present exercised by the Queen's Courts at Calcutta and Madras. Therefore, that notwithstanding such proviso, if Stephenson were at Bombay, this Court, on its admiralty side, would have jurisdiction over his alleged offence; and that if the proviso is to stand, Stephenson is a person amenable to this

Court in its ordinary jurisdiction within the meaning of that proviso. That if the proviso is to stand we are not to take the phrase "amenable to the said Court in its ordinary jurisdiction" in the sense contended for, with a view to invalidate the conviction of Allòo Paroo, for that sense would be repugnant to many other clear passages in the Charter, and indeed to the whole tenor of that instrument.

If Stephenson be amenable to the Court in its admiralty jurisdiction, if the Court could try him, if present at Bombay, for an offence on the high seas (of all which I entertain no doubt), the 9th Geo. IV. c. 74. extends to him; for the first section declares that the Act shall extend to all persons and all places, as well on land as on the high seas, over whom or which the criminal jurisdiction of His Majesty's Courts of Justice in India did or should thereafter extend. The criminal jurisdiction of this Court, on its admiralty side, extends to Stephenson, as to other persons, in respect of doings on the high seas; for, if brought to Bombay, he or they could be prosecuted in this Court. Therefore the 9th Geo. IV. c. 74., which prescribed the criminal law to be administered on the admiralty side of each of the Supreme Courts in India, extends to Stephenson and such other persons. Had Stephenson's crime been committed after the passing of the 9th Geo. IV. c. 74., and before the enactment of the 7th Will. IV. and 1st Vic. c. 89. s. 6., and thus, of course, before the passing of Act XXXI. of 1838; and had he been prosecuted for such crime on the admiralty side of this Court, or of the Court at Calcutta, the indictment must have been framed on the 9th Geo. IV. c. 74. s. 117.; so also must it have been framed had the prosecution been thus instituted after the passing of the 7th Will. IV. and 1st Vic. c. 89., but before the passing of Act XXXI. of 1838; for the 7th Will. IV. and 1st Vic. c. 89. did not alter the criminal law to be administered on the admiralty sides of the Supreme Courts in India. Had it done so, deplorable consequences might have followed; for after the passing of the 7th Will. IV. and 1st Vic. c. 89., but before it had become known in India, a man might have been convicted and executed, under the notion that the 9th Geo. IV. c. 74. s. 117. still subsisted, although in fact it had been repealed. Had Stephenson been charged in this Court with such an offence as that in question committed on the high seas after the passing of the 7th Will. IV. and 1st Vic. c. 89., but

before the enactment of Act XXXI. of 1838, s. 24., he must have been prosecuted under the 9th Geo. IV. c. 74. s. 117., and his punishment might have been death; although, had he been prosecuted and convicted in England for the same offence after the passing of the 7th Will. IV. and 1st Vic. c. 89., he could not have had judgment of death. No doubt he was amenable to the admiralty jurisdiction in each country, and according to the place of trial the measure of punishment would have varied. In this sense we see how "a man may be subject to two sets of Acts for one and the same offence, and at one and the same time, depending on the mere accident of the Court in which he happens to be tried." This will appear less strange if we consider that, for certain crimes on the high seas, the offender may be liable to the Admiralty of any country, and yet different measures of punishment may be allotted to the crime in different countries.

But it is said—"If Stephenson had destroyed the Belvidere on her passage out from England, and had been tried here, he must have been tried under the 7th Will. IV. and 1st Vic. c. 89., as not being, at the time he committed the offence, one of that class of persons to whom the 9th Geo. IV. c. 74. and the Acts of the Legislative Council are exclusively applicable." Now all this is fallacious. The Courts at Calcutta, Madras, and Bombay have, and constantly take, cognizance of crimes committed by subjects of Great Britain and other persons on the high seas, though such persons may never have been in India previous to their respective trials. To use the words of the 9th Geo. IV. c. 74. s. 1., they are persons over whom, and the high seas are parts over which, the criminal jurisdiction of those Supreme Courts, on their admiralty sides, respectively extends. Consequently, according to the very words of the 1st Section of the 9th Geo. IV. c. 74., they are of the class of persons to whom that Act extends, and Stephenson is one of them. That Statute provided how crimes on the high seas should be punished, if prosecuted on the admiralty side of a Supreme Court in India; for it directed, by the 25th Section, that all offences prosecuted in any of His Majesty's Courts of Admiralty should be subject to the same punishments as if the offence had been committed on land. What land? The land in India, over which the jurisdiction of the King's Courts extended. There is a similar clause in the 12th Section of the

7th and 8th Geo. IV. c. 28.; and what land does that clause refer to? England. That it was prescribed by the Legislature that the measure of punishment for offences on the high seas should depend upon, and be the same, with the punishment for the like offence if committed on the land in which the Court exercising jurisdiction was established. Although, in most respects, the penalties provided by those Acts, the 7th and 8th Geo. IV. c. 28. and the 9th Geo. IV. c. 74., were alike, yet some distinctions, dependent on climate and other circumstances, might be pointed out; and were such distinctions applied, the punishment would have been varied according as the offender had been tried in England or in India.

As was observed, I think by the counsel who impugned the conviction of Alloo Paroo, the 9th Geo. IV. c. 74. was the criminal code of the Supreme Courts in India. It prescribed the criminal law they were to administer, not merely with respect to offences on shore, but also with regard to crimes committed on the high seas, for the 25th Section provides for offences on the high seas. When the Legislature of Great Britain proposed to itself to delegate legislative powers with regard to India and the Courts therein to the Legislative Council of India, it is reasonable to suppose it was intended to delegate to such Legislative Council power to prescribe the law to be administered, as well with respect to offences committed on the high seas and prosecuted in India, as with respect to offences committed upon the Indian soil. I conclude and believe that such was the intention, and believe that such intention was effectuated by the 3d and 4th Will. IV. c. 85. s. 43.

The Legislative Council exercised that power to legislate for Her Majesty's Courts in India by prescribing laws to be administered in those Courts by Act XXXI. of 1838; and that Act extends to the high seas, and to persons committing offences on the high seas for which they would be amenable to the admiralty jurisdiction of the Supreme Courts; for the 2d Section declares the Act shall extend to all persons, and over all places, over whom or which the criminal jurisdiction of Her Majesty's Courts in India extends. That jurisdiction extends over persons amenable to the admiralty jurisdiction of those Courts in criminal matters, and in that respect over the high seas, where offences within such admiralty jurisdiction may be committed.

It has been insisted upon, however, that the legislative powers confined by the 3d and 4th Will. IV. c. 85. s. 43. are not extra-territorial; by which, I suppose, it is meant they cannot extend so as to affect persons within the admiralty jurisdiction of the Courts in India, for that is the only extra-territorial effect now in question. But such a limitation of the clause appears to be untenable, because the words of the clause are very extensive, and inasmuch as the 25th Section of the 9th Geo. IV. c. 74. (a Section wholly lost sight of or disregarded in the argument in this matter) prescribes that the punishment of any offence committed on the high seas shall be the same as if such crime had been committed on the land; and that Section is wholly unrepealed, as well by the 7th Will. IV. and 1st Vic. cap. 89. as by Act XXXI. of 1838. That Section, therefore, is still law; and in order to ascertain what penalty is to be inflicted for a crime on the high seas, we have only to consider what the penalty would be if the offence were committed on the land. As Act XXXI. of 1838 prescribes the punishments for offences on land, and the like penalties are to be imposed on the like offences perpetrated on the high seas, it is vain to say that such Act has no extra-territorial effect in the sense contended for. Its effect, like that of the 9th Geo. IV. c. 74., is intra-territorial, so far as it is confined to tribunals in India; but its effect extends to offences on the high seas, and thus to the high seas, and in that sense is extra-territorial.

It might happen that the penalty prescribed for a particular crime by the Legislative Council should be different from that prescribed for the like crime in England, and thus a different measure of punishment might be established for crimes within the admiralty jurisdiction in England and similar crimes within the admiralty jurisdiction in India; but as already shewn, that result existed before Act XXXI. of 1838 had been passed: for until that local Act was made, either the 9th Geo. IV. c. 74. or the 7th Will. IV. and 1st Vic. c. 89. would have been the Act under which a culprit such as Stephenson should have been prosecuted, according as he was tried for the offence in England or in India.

If, then, at the present period, Stephenson were brought to Bombay, and this Court, on its admiralty side, were to take cognizance of alleged crime on the high seas, as no doubt it would be competent to this Court to do, the indictment should be framed under Sec. 24. of Act XXXI.

of 1838, which, as prescribing the punishment for the offence committed on shore, also declares the punishment for the like offence on the high seas, where the prosecution of such offences is on the admiralty side of one of the Supreme Courts in India.

The whole argument may be briefly put as follows:—Stephenson is within the 9th Geo. IV. c. 74., as being a person over whom, according to the words and meaning of the 1st Section of that Statute, the criminal jurisdiction of Her Majesty's Courts in India, viz. on the admiralty side of those Courts, respectively extends. In like manner he is within Act XXXI. of 1838, for the 2d Section of that Act provides that it shall extend to all persons and places over whom or which the criminal jurisdiction of Her Majesty's Courts in India extends; and Stephenson is within such criminal jurisdiction, viz. on the admiralty side of the Supreme Courts respectively. If this construction of Sec. 2. of Act XXXI. of 1838 be denied as too liberal or extensive, the construction is either upheld, or Stephenson is necessarily within that Act, because the 25th Section of the 9th Geo. IV. c. 74. provides that the punishment of an offence on the high seas shall be the same as if such offence had been committed on land; therefore a power to enact punishments for offences on shore includes power to prescribe punishments for offences at sea, punishments for the latter offences being governed by, dependent upon, and identical with, punishments for the former. Therefore Act XXXI. of 1838, extending to persons on shore within the criminal jurisdiction of Her Majesty's Courts in India, extends to persons within the criminal jurisdiction on the admiralty side of such Courts respectively. Therefore Stephenson, being within such last mentioned criminal jurisdiction, is within Act XXXI. of 1838.

In this Court, therefore, and with reference to its jurisdiction and the punishments it is bound to award, the alleged offence of Stephenson is to be considered as coming under Sec. 24. of Act XXXI. of 1838, which prescribes the punishment to be imposed, if Stephenson should be convicted on the admiralty side of this Court. Consequently, the indictment against Alloo Paroo, as an accessary before the fact to such offence, was correctly framed under the same enactment. That indictment might have been better, as less open to cavils, had the several counts concluded "against the form of the Statute" (the 9th Geo. IV.

c. 74.), as well as "against the form of Act XXXI. of 1838," any defect on which score would be unimportant after verdict; or had the counts contained averments to the effect that Stephenson was a subject of the Crown of England, and not an alien, and that the crime had been committed on board a British ship, and not an alien vessel. But objections on these latter grounds would be untenable, I conceive, after verdict, and still more ineffectual after judgment; and however this Court might be disposed to look at substantial defects, which should affect a conviction in error, it cannot promote or give attention to frivolous or purely technical cavils.

Judgment of SIR ERSKINE PERRY, J.

I also think that the leave to appeal against the conviction in this case should be refused, and this upon two grounds; first, because the objection taken, being wholly technical and unconnected with the substantial justice of the case, is not one of those to which the Court should accede within the true meaning of the Charter of Justice; and, secondly, because, even upon strict law, the objection is untenable.

Upon analysis of the arguments urged in behalf of the prisoner, the objection will be found to amount to this, that the words "against the form of the Statute" are not inserted in the indictment. For it is quite obvious that Stephenson might have been indicted for this offence, either under the 9th Geo. IV. c. 74., according to the argument of *Mr. Howard*, or under the 7th Will. IV. and 1st Vic. c. 89., in either of which cases, and to meet either of which cases, the words I have mentioned would have been sufficient. This being so, and supposing the objection to be a good one, I cannot conceive that it is one to which the Court ought to give way, urged as it is now for the first time, nine months after the trial, and after the sentence of transportation; provided, that is to say, the Court has any discretion to exercise upon the matter. Decisions have been referred to in England, to shew that a similar defect is fatal in arrest of judgment; but it is most important to observe, that our Charter of Justice has not allowed to criminals a writ of error, nor even the right to appeal absolutely, as in civil cases, but has given this Court "full and absolute power and authority to allow and deny such appeal" as it shall think fit.

It is very easy to understand why the writ of error was not given in criminal cases, and why such a large discretion should be attributed to the Judges to allow or admit the appeal. The extreme technicality which has disfigured our criminal law has brought down upon it much obloquy, from its evident tendency to defeat the main interests of justice.

The most distinguished Judge, perhaps, who ever adorned the English Bench, wrote, nearly 200 years ago, as follows:—"Many times gross murders, burglaries, robberies, and other heinous and crying offences, escape by these unseemly niceties, to the reproach of the law, to the shame of the Government, to the encouragement of villainy, and to the dishonour of God." 1 Hale, P. C. A writer of high authority of the present day re-echoes the same complaints.

"It is to be regretted," says Mr. Starkie, "that the Courts, in listening to trivial errors, have so frequently sacrificed the great ends of justice to a mistaken and misplaced humanity, precarious in its application, since it extends without distinction to all degrees of guilt, and mischievous in its consequences." 1 Starkie's Crim. Plead. 353. When the strong-minded men who aided SIR ELIJAH IMPEY to draw the Charter of the Supreme Court,—LORD THURLOW, LORD LOUGHBOROUGH, CHIEF JUSTICE DE GREY, and LORD BATHURST,—men distinguished both as statesmen as well as lawyers, were considering the provisions relating to criminal law, it is not likely that they would willingly inflict on the Indian community a mass of technicalities, the painful inheritance of centuries, which had been found so signally to favour crime at home. What was desired by them no doubt was, to promote justice to the utmost by discountenancing appeals on frivolous technical grounds, and to allow them only when the substantial merits of the case were involved. This object was accomplished, in my opinion, by their refusal to give a writ of error in criminal cases, and by clogging the right to appeal with the discretionary power before mentioned which is confided to the Court. We know that in civil appeals the principle is always acted upon by the Privy Council of regarding substance only, and not form; and with respect to criminal matters, we have it from the highest authority, that the same principle is kept in view, and substantial objections only are attended to in that tribunal. In *Rex* v. *Suddis*, LORD KENYON said, "on appeal to the Privy Council from our colonies,

no formal objections are attended to, if the *corpus delicti* sufficiently appear to enable them to get at the truth and justice of the case;" and in the case then before him, the Court of King's Bench, though a Court of strict law, overthrew a technical objection to proceedings of a Court at Gibraltar, which undoubtedly would have prevailed if the proceedings had come up from an English tribunal.

It seems to me impossible that any other rule could exist with regard to the due execution of justice in Colonial Courts. Legal practitioners in the Supreme Courts of India are called upon to draw pleadings according to four very different, and all very technical, systems. Each of these is cultivated as a science by a special branch of the profession at home; but even there we have seen, in a recent case, where the highest talent which the Bar could afford was available, how difficult it is,—it may be even said, how impossible,—to draw criminal pleadings which shall stand the fire of the host of professional men who may be arrayed against it when the pecuniary means are sufficient to call their services into the field. But if the law pleadings of Colonial Courts are to be tested by the same golden scales which are occasionally applied to them in England; if at any length of time after conviction our indictments may be overhauled to discover whether any "then" or "there" has been omitted, or other similar error is apparent; I think I may safely say that crime will enjoy an immunity from punishment which it is somewhat painful to contemplate.

I therefore think that the decisions on writs of error in England do not govern the point now under discussion, namely, whether the Judges are at liberty to exercise a discretion in refusing an appeal on an objection like the present. I think further, that where the petition for leave to appeal is founded on a mere technicality unconnected with the guilt or innocence of the party, the question comes before us as *res integra*, and is to be disposed of on broad principles. And, finally, I think that it would be a most dangerous precedent to set to our successors, if we were to allow an appeal in the present case, on the objection which I have before stated.

But even supposing that this Court had no discretionary power in the case, and that we are bound to allow the appeal if a writ of error would lie, I am clearly of opinion that the objection propounded is not

maintainable. The main argument of the counsel for Alloo Paroo is, that the late Charter Act does not give the Governor-General authority to legislate for offences committed on the high seas, but only for those committed within the territories of the East-India Company, or of an allied State. The argument was not quite so broad as this, because it was conceded that there might be a power of legislating as to natives of India whilst on the high seas; but as this concession was demurred to by the other Counsel for the petition, and is, in point of fact, fatal to the validity of the reasoning, it must be taken that the broad proposition was enounced as I have stated it.

The question turns on the true interpretation of Sec. 43. of the late Charter Act. By that clause the most ample powers of legislation are given,—powers to repeal all existing laws, whether Acts of Parliament or local Regulations, and power to enact others in their stead, and the restrictions as to what Acts shall not be passed, are carefully and distinctly specified. They are four in number: first, that no provision in the Charter Act shall be repealed; second, that no provision in the Mutiny Acts shall be repealed; third, that no provision of any future Act affecting the Company or the inhabitants of India shall be repealed; fourth, that no Act of Parliament or unwritten law respecting the constitutional relations between the Company or the inhabitants of India and the Sovereignty of the Crown and Parliament shall be in any way varied or repealed.

All these provisions are manifestly inserted on the broad ground, that it was necessary, in the delegation of so important an element of the sovereign authority as the power of legislation, to preserve the paramount rights and powers of the sovereign Legislature intact. But the expression of these reservations clearly establishes in my mind that all other powers of legislation not reached by them are included in the general words of the clause. The particular words which are relied upon to shew that the Governor-General in Council has no power to legislate for persons on the high seas are these: "The Governor-General in Council shall have power to make laws for all persons, whether British or native, foreigners or others, and for all Courts of Justice, whether established by His Majesty's Charters or otherwise, and the jurisdiction thereof, and for all places and things whatsoever within

and throughout the whole and every part of the said territories." It is contended that these latter words apply to the persons who are to be legislated for, as well as to the places and things with which they are immediately collocated. But the express distinction which is made in the Act between persons and things lies deep seated, I apprehend, in the principles of legislation, and corresponds with the distinction, well known to jurists, between personal and real Statutes. The laws of a country prohibiting crime are personal laws, and render the persons of that country amenable to its criminal jurisdiction, wherever the crime may have been committed. A real Statute on the other hand,—a Statute affecting the *res* or thing,—only has operation where the *res* is locally situated.

It is only by an accident connected with the peculiar nature of English procedure that offences committed by Englishmen on the high seas, or in *partibus transmarinis*, are not cognizable by the common law, and that they have required special legislation to reach them. At every period of our history a murder, or a robbery, must have been a crime which society was interested to punish, whether it was committed on sea or land; but by the common law the trial of all offences must take place in the district where they occurred, by a jury belonging to that locality. If, then, a crime occurred in a place from which no jury could issue, as on the high seas, the common law became impotent to afford a remedy. But still the criminal did not escape, and other tribunals, known to the ancient law, were open for the trial of offenders.

The admiral had jurisdiction, independent of special Statutes, over all offences committed at sea, and the Court of the Constable and Marshal for offences committed on land out of the realm. The latter point was solemnly determined by the Judges in the mysterious case of Doughty, who was executed by Sir Francis Drake on an island in South America. And I would here just note, that the late biographer of the great circumnavigator has strangely overlooked the criminal proceedings which were instituted against Drake on his return to England. Old law books were probably much out of the course of Mr. Barrow's reading; but if he had fallen in with LORD COKE'S, 3 Inst. 48, 1 Inst. 74, *b.*, Mr. Hargrave's note, and Hutton, 3, he would have seen that Doughty's friends did not fail to stir the matter in the Criminal

Courts, and that it was only through the interposition of the Queen that it was allowed to drop. There are other instances of the Court of Constable and Marshal sitting to try crimes committed out of the British dominions; and although this Criminal Court has now fallen into desuetude, these instances are quite sufficient to prove my proposition, that the criminal laws of the land, without any express provision, are binding on persons subject to that law, in whatever part of the world they may transport themselves to. A complete confirmation of this may be found in the laws of other nations.

In the Code Penal, for instance, the law denouncing the crime of malicious burning merely states the offence and the punishment, without the least reference to the locality where the crime may be committed. Article 432 expresses, in one paragraph, that the burning of a dwelling house, ship, boat, or warehouse, used or serving for habitation, shall subject the offender to the punishment of death; and it is quite clear that such a personal Statute binds the persons subject to the French law equally on sea or on shore.

The inference from the above reasoning is, that the unlimited delegation of authority to legislate for all persons carries with it the inherent power to pass all such personal Statutes as are requisite for the good government of a great country.

But can it be contended for a moment that it is not essential to a Government like that of India to be able to prevent excesses and enormities on its coasts, or on the uninhabited and barbarous islands in the Indian seas?

Suppose that the fishermen on this coast were discovered to be engaged in a series of fraudulent transactions half a mile from the shore, can it be that, under the clause which enables the Governor-General in Council to legislate for "all persons whether British or native," no power exists to regulate fisheries? Or suppose that under the new trade which has sprung up of transporting coolies to the Mauritius, a set of unprincipled men were to find their way to the commands of the carrying ships, and a repetition of the horrors of the middle passage were to occur, is it possible that the Government of this country is unable to introduce any laws to restrain such practices? It may be said, that in all such cases the remedy is to be sought by applying to

the Imperial Legislature; but the answer is, that Parliament, from its distance, from its multiplicity of business, from its necessary unacquaintance with local details, felt itself wholly incompetent to deal with such matters of internal government, and for these reasons has delegated this portion of its authority to the Governor-General in Council.

I think, therefore, that it is quite clear that it was not the intention of Parliament to restrict the powers of the Legislative Council to persons merely within the territories of India.

Who the persons are to whom their powers of extra-territorial jurisdiction extend is another question, and may afford subject for nice legal interpretation in certain cases.

It is pretty apparent that the same rule of construction might not apply if the person were a foreigner, as if he were an Englishman or a native; for as the Imperial Legislature does not possess the power of passing personal Statutes for foreigners *extra territorium*, of course it could delegate no such power to the Legislative Council.

But we have not to dispose of such a case now, and have only to consider whether Stephenson was such a person to whom the clause in question extends. But Stephenson was described in this indictment as every other British subject who is brought to the criminal bar for trial: no special clause in the indictment to bring such a prisoner within our jurisdiction is ever inserted in admiralty cases; and our admiralty jurisdiction being co-extensive with any such jurisdiction at home, as the Chief Justice has conclusively shewn, no special averment, I conceive, was necessary. In *Æneas Macdonald's case*, Foster's Crown Law, 59., the prisoner, who was indicted for high treason, set up that he was a native of France, but the Court held that "the presumption in all cases of this kind is against the prisoner; and the proof of his birth out of the King's dominions, when the prisoner putteth his defence on that issue, lyeth upon him;" yet the indictment in that case did not aver, any more than the indictment in this, that the prisoner was a native of Great Britain.

By the evidence at the trial in this case, Stephenson was shewn to have been an inhabitant of Bombay for many weeks, if not months, previous to the concocting of this offence; and that after the burning of the ship he returned here voluntarily, and again remained many weeks, and, indeed, was then tried for an offence committed within the har-

bour of Bombay. If, then, he is not to be considered as one of those British persons over whom the Governor-General in Council has the power of legislating, there seems scarcely any one to whom the clause can apply, as we know that the majority of the English, although they may pass the greater part of their lives in this country, are still held not to have their domicile in India.

I think, therefore, that the words are quite sufficient to carry out the intention, which I conceive to be abundantly apparent on the face of the Act, to enable the Governor-General in Council to provide for offences committed on the high seas by a person like Stephenson. But as the argument relied on proceeded on what are supposed to be some specially restrictive words, I think it right to point out that there are other words in the clause which give this authority specifically.

The clause in question enables the Governor-General to legislate for the Supreme Courts, and for the jurisdiction thereof; but this Court had already jurisdiction over the high seas. The high seas, therefore, are brought within the range over which the Governor-General in Council is expressly authorized to make laws. This argument by itself appears to me to be conclusive, but I have thought it right, in a case where such very important interests are concerned, and where so much of our criminal procedure is implicated, not to rest the case on what may be mere fortuitous expressions, but to grapple boldly with the question as to what is the manifest intention and object of the Legislature.

There is only one other argument that I think it necessary to notice. It is considered a fatal objection to the Legislative Council having jurisdiction over the high seas, that a man might thereby be subjected to two different punishments, and that it would depend on the mere chance of the Court to which he was first brought which of the two punishments he should receive.

But this is no objection at all; it is inherent in the subject-matter: the high seas being a place subject to the common jurisdiction of nations have always given rise to the same difficulty.

Parliament itself has perceived it in the case of the legislative authority they have given to India.

By the Mutiny Act for the Indian navy, which was made under the authority of Parliament, offences on the high seas may be

disposed of by Court-Martial; but such offences may also be dealt with, and have a different rate of punishment assigned, by this Court sitting on its admiralty side. The Act has foreseen this, and provided for it, by enacting that there shall not be two trials for the same offence.

A conflict of laws between two parts of the same dominions is no doubt an evil, but it is occasionally inevitable.

Such conflict existed between England and India, when the former country repealed the English Act relating to malicious burnings, 7th and 8th Geo. IV. c. 30., and the Irish Act 9th Geo. IV. c. 56., but omitted to repeal the Indian Act. The 7th Will. IV. and 1st Vic. c. 89., repealing these Acts, were passed in consequence of the recommendation of the Criminal-Law Commissioners, who advised that a lesser punishment than death should be awarded in certain offences not directed against life or limb. But as the Indian Act was not repealed, a man brought before the Supreme Court might still have suffered death for an offence like that committed by Stephenson; whereas, if he had been tried in England, he could only have been sentenced to transportation. Such conflict, no doubt, is unseemly, and inconvenient, but it is the lesser of two evils; for if Parliament had assumed to repeal the Indian Act, the consequence would have been, that a man might have been sentenced to death and executed by a judgment of the Supreme Court in India, under a law which no longer existed, although that fact was not known in India. An occasional conflict of laws, therefore, being wholly inevitable when two distinct sources of law are allowed to co-exist with respect to the same subject-matter, it must be left to the wisdom of the two Legislatures to make the conflict as short and as unimportant as possible.

This, in my opinion, has been completely achieved by the course taken by Parliament and the Legislative Council. The former would not interpose its authority in a locality wherein it had permitted another legislative body to operate; and the latter, at the earliest moment, took up the task which the Imperial Legislature had left to it, of repealing the clauses in the 9th Geo. IV. c. 74., which clash with the new English Statute, and enacting similar positive clauses in their Act XXXI. of 1838.

In my view, therefore, the law as to both countries is now perfectly harmonious; and the conflict, upon which the learned Counsel has built part of his argument, wholly imaginary.[1]

No. XVII.

CASSIMBHOY NATHABHOY AND FAZUL GOOLAM HUSSEIN, TRADING UNDER THE NAME AND FIRM OF CASSIM 'NATHA AND COMPANY

versus

JEWRAZ BALLOO.

13th November 1846.

JUDGMENT of the Honourable SIR DAVID POLLOCK, C. J.

This is an action of trover, by which the plaintiff seeks to recover from the defendant a large quantity of ivory (263 pieces), which, he alleges, was obtained by one Heerjee Jetsey from him fraudulently; and upon which ivory, without notice or knowledge of such fraud, the defendant has made an advance *bonâ fide* of the sum of Rs. 3000. This case was recently argued before the Court, and stood over for judgment, as I was desirous of having an opportunity to look into the cases cited, especially as it had been previously before the Court for trial prior to my arrival in India. This circumstance, also, led me to wish, that as the matter would have been much considered by my learned brother during the previous proceedings, the present judgment should be given *seriatim*. The facts of the case will be more fully stated by my learned brother. There is no doubt whatever that Heerjee Jetsey obtained the possession of the ivory in question from the servant or clerk of the plaintiff, by sending a cheque in payment upon one of the banks in Bombay; which cheque, when presented for payment on the following day, turned out to be a forgery. The question, therefore, in this case to be now decided by the Court is,

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[1] There was a petition for leave to appeal to Her Majesty in Council from the judgment of the Supreme Court in this case, when the Judicial Committee decided, that, under the Bombay Charter of Justice, the Supreme Court at Bombay is invested with full and absolute power to allow or deny an appeal in criminal cases, and no power is reserved to the Crown by such Charter to grant leave to appeal in such cases. *The Queen* v. *Alloo Paroo.* 26th June 1847. 3 Moore Ind. App. 488.

whether the delivery of the ivory to the servant of Heerjee Jetsey, who was sent to bring it away, and to deliver the cheque, was a parting on the part of the plaintiff, by his servant or clerk who received the cheque, with the property in the ivory, or of the possession only, such possession having been thus fraudulently obtained; as, in the former case, the plaintiff will not be entitled to recover. I have looked into the cases which have been cited at the Bar with great attention and anxiety; and comparing them together, and seeking to extract the principle deducible from them all, I am very clearly of opinion that the verdict must be entered for the defendant. The test by which the case is said to be decided is, whether, under all the circumstances, Heerjee Jetsey could be convicted of larceny in respect to the mode by which he obtained possession of the ivory. This has never been contended for; and if he could not, it must follow, that, in parting with the ivory to Heerjee Jetsey's man, the plaintiff, through his servant or clerk, parted with the property in the ivory to Heerjee Jetsey, and not merely with the possession. If the property, by such delivery, vested in Heerjee Jetsey, then he was entitled to raise money upon it, as he did from the defendant, and to hand over the ivory as a security for such advance. The action of trover is founded entirely on the assumption that the plaintiff in trover had never parted with the property, but that it continued in him. The cases of *Parker* v. *Patrick*, 5 T. R. 175, *Rex* v. *Parkes*, in Leach's Crown-Law Cases, 614., and some others, are conclusive to shew, that where there has been a delivery of the property there can be no larceny; and, consequently, that the property in the goods has become vested in the party to whom they have been delivered. Here, however, it is contended that there has been such a fraud on the part of Heerjee Jetsey, that the delivery to him cannot be considered a delivery that transferred the property in the ivory to him. But I think that the fraud complained of must be a part of the original transaction between the vendor and proposed purchaser, by the operation of which fraud the sale of the goods is procured. It is upon this principle that the following passage in Russell on Crimes is founded, Vol. 2. 109, 2d edit.: "If the owner part with the property in the goods taken there can be no felony in the taking, however fraudulent the means by which such delivery was procured." Now I am of opinion, in this

case, that the contract for the sale and purchase of the ivory was complete on Sunday the 8th of February, and that the transaction of Monday, fraudulent as it was on the part of Heerjee Jetsey, had relation only to the delivery of the goods; and that such delivery by the servant or clerk of the plaintiff, and his acceptance of the forged cheque, was a delivery of the property, as well as the possession by virtue of the contract for sale made the day before; and range this case with that of *Rex* v. *Parkes*, where the conviction for felony was held wrong, because, although worthless bills were given to the vendor's servant in order to obtain the possession of the goods (as the forged cheque was in this case), the vendor had parted with the property, the contract for the sale having been made at a previous time, though not many hours before. And this I think the true distinction in these cases of fraud. If there be a fraud in the original contract, that will vitiate the sale, and the delivery afterwards will not pass the property; but if the contract of sale be complete, no fraud in obtaining possession of the goods will invalidate such contract, but possession so obtained is a transfer of the property. This is so obvious by the governing principle that influenced the Judges in the case already mentioned of *Rex* v. *Parkes*, and also the judgment in *Harvey's case*, 2 Russell on Crimes, 109, 2d edit., and which appears to be founded on a very intelligible distinction, that it ought to prevail for the protection of *bonâ fide* purchasers without notice, or pawnees like the defendant, who would otherwise have no protection in such transactions, which, in a commercial country, must continually occur. Indeed, it seems to me open to no complaint of hardship on the part of the plaintiff, for he has the means of protecting himself by retaining his goods until he is assured of his safety in parting with the possession of them; whereas, a party in the position of the defendant, finding a person in the possession of the property, on the security of which he is negociating for an advance, could scarcely be expected to delay entering into such a transaction until he had satisfied himself when, where, and how, the property had been obtained by the party seeking the advance. Thinking, therefore, as I do, that the distinction I have pointed out as to obtaining the possession of goods by fraud, in its operation upon a sale, is founded upon good public policy, and is marked very strongly in the cases I have

mentioned, I am clearly of opinion, that in this case the fraud of giving the forged cheque to obtain possession of the goods did not invalidate the contract which had been made the day before; and that in accepting the forged cheque, and delivering the ivory to Heerjee Jetsey, the plaintiff's servant or clerk parted with the property in the goods on behalf of his master, and that, consequently, the verdict in this case must be entered for the defendant.

Judgment of the Honourable Mr. Justice Perry.

The facts necessary to be mentioned for the decision of this case are as follows:—On Sunday morning, in February last, Heerjee Jetsey, a petty merchant in this place, bargained with the plaintiff for the purchase of a lot of ivory. The ivory was weighed, an entry of the sale was made in the plaintiff's books as of a sale at two months' credit, with a rebate for ready money, and every thing was settled but the taking away and paying for the goods; for the bargain must be taken to have been a ready-money sale, as, although the entry was as of a sale at two months, with two per cent. rebate, that was only a mode of ascertaining the ready-money price; and Heerjee Jetsey gave as a reason for not taking away the ivory on that day, that it was a Sunday, and that he would bring the money on the morrow. On that day he sent his servant with a cheque for Rs. 5000, which was something under the amount due on the ivory, and which purported to be drawn on the Bank of Bombay by Manockjee Nasserwanjee, who is a well-known merchant here. A partner of the plaintiff's took the cheque, and, although unable to read English, saw that it was for Rs. 5000, and delivered the ivory. On that same Sunday Heerjee Jetsey applied to the defendant for an advance on ivory, and the defendant, who had been in the habit of making him advances on goods previously, consented to do so. The ivory, accordingly, which was taken away from the plaintiff's warehouse about four o'clock on Monday, was brought to the defendant's about five or half-past five, and the money was advanced. The cheque having been given so late on the Monday was not presented at the Bank till the next day at eleven or twelve o'clock, when it was discovered to be a forgery: search was immediately made after Heerjee Jetsey, but he had absconded. It was then disco-

vered that Heerjee had pledged the goods with the defendant; proceedings took place at the Police Office, when the ivory was impounded; an action was brought against the Magistrate for not delivering up the goods to the plaintiff, but those proceedings have been abandoned; and now, by agreement between the parties, the question has come to be decided upon its true merits, namely, on which of those two innocent parties the loss occasioned by Heerjee Jetsey's roguery is to fall. Whenever such a case arises, the rule which selects one or other of the parties to bear the burthen must proceed on grounds more or less arbitrary; and in the present case abundance of argument is available on either side, to guide the judgment of the Court in favour either of plaintiff or defendant. The point to be decided on is, whether a *bonâ fide* purchaser, who obtains goods from a party who has got possession of them by a fraudulent contract, is entitled to hold them against the original holder; and the state of the decisions in the English law is such, that it appears to me that it is very much open to the discretion of the Court to decide either way. This, indeed, is always the case in the English system when a new point arises, and it is the boast of the common law that it is able to mould itself to the growing exigencies and ever-changing events of a commercial and progressing society without recurrence to the Legislature, as is necessary in some other countries. The theory is, that our system of jurisprudence contains within it principles capable of being applied to all the varied relations of life, according to the soundest views of justice and expediency. But it follows from this view, that where any case arises as to which the rule applicable is not very readily perceptible, the inquiry takes the direction as to what the principles of sound reasoning demand, and the proper answer to what the law is, may often readily be determined by ascertaining what the law ought to be. In the present case, two conflicting principles meet: as, at the onset, it is one of the first axioms of jurisprudence that a sale of goods belonging to another confers no title on the purchaser; on the other hand, exigencies of commerce require that the transfer of merchandize should be made in the readiest manner, and that *bonâ fide* possession should be protected. But as the difficulty raised by this conflict must have occurred in other countries besides our own, it becomes important to see what principle other commercial

codes have established on the subject, and to ascertain whether the rule which experience and the wants of mankind have suggested elsewhere can be made to accord with the principles of our law. Now the Roman law, it is said, gave a valid title to a *bonâ fide* possession, even in the case of stolen property, and the owner had only a remedy against the thief, 2 Kent's Comm. 320, Ross on Sales, 187. But the American Chancellor, and our own countryman, are undoubtedly wrong in their statement of the law; for it is most clear, that, by the early Roman law, a man could gain no title by prescription to property either stolen or obtained by violence; see Inst. 2. 6. § 1. and 2., and Vinnius ad cund. tit. Except, indeed, by the prescription of thirty years, and even in the later law, when trade began to rise under the Emperors, there is a very pithy constitution in the code, rebuking some merchants who had bought stolen goods, *bonâ fide*, and who applied and had their advances paid by the owner before they gave them up—cite Code, Lib. VI. tit. 2., *Incivilem rem desideratis*, &c. The Roman law, therefore, made the rights of property paramount. *Res furtivæ* could be claimed by the owner wherever he found them, and every moveable which had been aliened in property was considered *res furtiva* (see 4 Hugo's Civ. Cr. 102, 103); and the *conditio furtiva*, which Kent speaks of, was only an additional remedy against the thief and his heirs if the owner could not recover his goods elsewhere. But in the countries where the Roman law was adopted a relaxation of the rule was required in favour of commerce, and I. Voet has collected a quantity of Statutes of the Low Countries, in which he wrote, by which the Roman law was altered in favour of *bonâ fide* purchasers. He also discusses the question whether goods obtained by fraud are to be considered in the same light as goods obtained by larceny; and he thinks they are, though he cites the opinions of other civilians who differ on the point. But the practical conclusion to which those commercial countries appear generally to have arrived at is, that *bonâ fide* purchase of goods in market overt ("*in publicis nundinis*"), whether they were obtained by felony or fraud, obtained a good title; I. Voet, Pand. 419. et s. 99. The Scotch Law, as I had occasion to mention during the argument, allows the owner of stolen goods to recover them anywhere, even though bought in market overt; but as to goods obtained by a fraudulent contract, it

enables a *bonâ fide* purchaser to retain them; see the note in Erskine's Institutes, 666, 667.

In the French law exactly the same question has arisen, and the same arguments have been used, as in the present case. The French, like the English law, enables the owner of stolen property to recover it from a *bonâ fide* purchaser (though under more restrictions than our law imposes); and in a case where goods had been obtained under a fraudulent contract, and sold to a *bonâ fide* purchaser, it was contended that they were exactly in the same category as goods obtained by theft. That to pass a property in goods the consent of the owner was required, and that consent obtained by fraud was equivalent to no consent at all. The Cour Royale of Paris assented to these arguments, and held that the original owner might recover; but the Court of Cassation reversed the decision on this amongst other grounds, and the reasoning proceeding on general principles is so applicable to this case that I venture to translate it:—"Larceny must not be confounded with obtaining goods by false pretences (*escroquerie*), as, in the latter case, the party defrauded accepts the credit of the rogue, and by the sale he makes to him he confers upon him a title wholly independent of the possession; whereas in larceny there is neither sale nor voluntary delivery." *Arret du* 20th *Mai* 1835, Ch. Civ. Dall. 1835, 1338, Rogeron's Cod. Civ. 1445. Finally, in the American law two decisions are cited in the note to the last edition of Kent's Comm. Vol. 2. 325, 4th ed., which shew that a *bonâ fide* purchaser may retain goods which have been obtained from the original owner under a fraudulent contract; and those decisions are the more in point, because that law, following the tendency of the English law as to sales in market overt, but going much further, wholly disallows a change in the title to property to be effected by public sale. According to all those codes of law, therefore, it would seem that the defendant, under circumstances such as have arisen in the present case, would be entitled to hold the goods; and I think the English law affords the same rule. The principle seems to me quite indisputable in our criminal law, that where the owner of goods parts with the possession of goods, intending to part with the property at the same time, the property passes, however fraudulent the means may have been by which his will has been determined. *Parke's case*, and

many others collected in 2 Russ., established this proposition, and I am quite unable to distinguish them from the present case. On the other hand, there are many cases on the civil side of the Court in which it has been held, that where goods are obtained by fraud no property passes. It is our duty to reconcile these apparent *antinomia*, if possible, and to draw from them a harmonious rule, which shall bring our decision within the principles of all the previous authorities. I think that this may be done, and that all the cases in which the general expressions alluded to were employed, may be explained on grounds which leave the principles recognized in the criminal law entire. In *Noble* v. *Adams*, 7 Taunt. 59., for instance, which is one of the first cases where no property was said to pass in goods obtained by false pretences, it was the plaintiff himself who was suing on the fraudulent contract. And it obviously would be monstrous to allow a party who had obtained goods under a fraudulent contract to set up his title to them as on a valid contract. So in *Irving* v. *Motley*, 5 Moore and P. 380., 7 Bing. 543., which has been so much discussed here, the defendant had got possession of the goods by the fraud of his agent, and that, evidently, is the true ground of the decision as it was put by MR. JUSTICE GASELEE. Then in *Earl of Bristol* v. *Wilsmore*, 1 Barn. and Cres. 514., the party who obtained the goods by fraud made them over on the same day to his sister-in-law, who was a creditor, and that circumstance might very well prevent any title passing to her, as it would in the Scotch law, where creditors are not allowed to avail themselves of the title of goods which their debtor has acquired under a fraudulent contract; but I admit that that circumstance was not adverted to in the arguments or judgment. *Keable* v. *Payne*, 3 Nev. and P. 531., at first sight, appears a very strong authority for the plaintiff, as it seems to proceed on the conceded point of law that a *bonâ fide* purchaser gains no title where the goods are obtained by fraud. On first reading the case, and adverting to the state of the authority, I was surprised to find that the very able Counsel for the defendant had not made the point which has been argued in this case; but on looking at it again, I think it is fully explained by the note of the reporter, namely, that the jury found that the defendant was not a *bonâ fide* purchaser. In addition to those authorities, apparently making for the plaintiff, there must be added

the remarks which have from time to time been thrown out on *Parker* v. *Patrick*, 5 T. R. 175. LORD KENYON's decision, undoubtedly, has been much shaken, and especially by LORD DENMAN's observations in *Peer* v. *Humphrey*, 2 Adol. and Ell. 495., 1 Harr. and Woll. 28.; still the latter were in some degree *obiter*, the former was a decision in *rem*; and a decision by LORD KENYON on the principles of property, and its modes of transfer, can never be overruled, except with the greatest deliberation. If it be true, by the law of England, the property passes in goods which the owner is induced by fraud to sell, the decision in *Parker* v. *Patrick* was right, and should be adhered to; and it appears to me that that is the principle of the law, although, as against the fraudulent contractor, and those claiming under him as volunteers, or even creditors, it may be perfectly true to say that no property passes. It may, perhaps, seem a contradiction in terms to say that cases can be reconciled, some of which hold that the property passes in such a case, some that it does not; but this contradiction is only superficial. In the civil cases, in which the latter form of expression is to be found, it was not necessary to consider what the rights of a *bonâ fide* purchaser might be, and therefore perfect accuracy of definition was not required. No one doubts that such a fraudulent contract is invalid, and that the innocent seller has the right, as against the fraudulent purchaser, and those claiming in privity with him, to treat it as altogether null; and therefore the compendious forms of speech fully justify the use of the phrase in the civil cases referred to. But *Parke's* case, which was a decision by the twelve Judges, and the other cases of the same class, decide the very point under discussion, namely, that the property does pass. I think it is right to add, that a very great authority on the nature of contracts, the President Pothier, gives exactly the same exposition of a fraudulent contract as the decision in our law seems to suggest, namely, that although the contract is vicious, and may be rescinded by the innocent party, still it is a contract, and the property passes under it. "*Lorsqu'une partie a été engagée à contracter par le dol de l'autre, le contrat n'est pas absolument et essentiellement nul, parcequ'un consentement quoique surpris, ne laisse pas d'être consentement mais ce contrat est vicieux, &c.*" Traité des obligations, Part 1. c. 1. sec. 1. art. 3. § 3. Du. Dol. It follows that if the property

in such case gets into the hands of a *bonâ fide* purchaser, he is entitled to retain, though neither the fraudulent contractor, nor those claiming in privity with him, would be enabled to do so.

No. XVII.

RAMLALL THAKOORSEYDASS AND OTHERS,

versus

SOOJAMULL DHONDMULL.

5th March 1847.

THIS was a case of a wager on the following event, viz. the average price of one chest of Patna opium of the opium to be sold at the first public Government sale of opium to take place at Calcutta next after the making of the wager, to be calculated according to the actual price which the whole amount of Patna opium which should be sold at such first public Government sale should be sold for and realize, the plaintiffs agreeing to pay the difference between such average price and the sum stated in the plaint if the average were below the stated sum, and the defendant agreeing to pay the difference if the average were above the stated sum.

It came on to be argued on the 22d February 1847 on demurrer to the plaint.

Crawford was for the demurrer, *Herrick* and *Howard contra.*

Judgment of the Honourable MR. JUSTICE PERRY.

The broad question which has been argued in this case is, whether a time bargain in the nature of a wager on the future price of opium at one of the Government public sales at Calcutta is a valid contract according to the law of England.

A few facts, not strictly contained within the record, have been imported into the argument; but as they were of public notoriety, such as the sale being by public auction, and the proceeds being a branch of the Government revenue, the Court, with a view of saving expense, was not unwilling to hear them assumed as if apparent on the face of the pleadings.

Now, the nature of the contract being such as I have stated, it is obviously a mere gambling transaction, and, as such, fraught with all

the evil consequences to society which that vice engenders. But in considering the validity of a gambling contract from a legal point of view, all these evil consequences, as attached to gambling generally, must be kept out of sight, because the common law of England, unlike the Code Civil and most other European Codes founded on the Roman law, allows gambling contracts to be sued upon, except in certain special cases, where considerations of a public nature, such as are sufficient to invalidate all contracts, intervene, or where the rights or interest of third parties would be injuriously brought into discussion. For although the British Legislature, by a Statute passed two years ago, 8th and 9th Vic. c. 109., has assimilated the law in England to the civil law by making all wagers and gambling contracts null and void, that Statute has not interfered with the English common law prevailing in other parts of the British Empire.

It is, I think, to be deplored that the common law has taken this course; and I have always regretted that the fine judicial arguments which MR. JUSTICE BULLER brought forward in *Goode* v. *Elliot*, 3 T. R. 593., against the validity of wagers generally, were not allowed to prevail, and that the Judges are compelled, as a general rule, to devote the public time, and to tend all the powerful machinery of Courts of Justice, to the enforcement of the contracts of mere gamblers.

Still, such is the law, and however much Judges, as grave moralists, may be disposed to frown upon gambling, and to find astute reasons in each particular case for disallowing the contract under discussion, I think the mischief which is produced by the Court permitting to itself this large discretion, compounding thereby the provinces of legislation and judicature, and rendering it impossible for the profession or the public to predicate in any case what the law on the subject is,—I say, I think these consequences are so grave, that it is our bounden duty to follow out the law which has been laid down into all its logical conclusions, and not to endeavour to give it the go-by by inventing subtle and artificial distinctions.

Accordingly, as the decisions in England have laid down most distinctly that time bargains, whether in the public stocks or in goods, are valid at common law, it appears to me that the Courts have no longer any discretion to exercise on the subject, but that they must humbly

follow the current of authorities, and pronounce this time bargain in opium to be valid.

This, indeed, has been the conclusion which this Court has arrived at, and acted upon, for some years past; and in the many opium cases which have come before us it has never been suggested that there was any thing to distinguish a time bargain in that drug from the time bargains in other commodities which had been sanctioned by the Courts at Westminster Hall.

The decisions I refer to, however, have not made the same impression upon his Lordship here, nor, as I understand, upon the Supreme Court at Calcutta, which they have upon myself. It is therefore incumbent upon me, and indeed it is due to the public, who have been influenced by our previous decisions, to state my reasons why I think those decisions were sound, and ought now to be upheld.

It is conceded by those who maintain the invalidity of this contract, that a wager *per se* is legal, and that it lies upon the party who resists the enforcement of it to bring forward distinct legal grounds for its nullification. I have alluded briefly to the excepted cases wherein wagers are illegal. Statutory provisions, immorality, injury to third parties, and tendency to effect the public interests or public policy, comprise, I believe, the whole of the grounds on which the illegality can be based. In the present case the illegality of this wager is rested on its alleged evil tendency as respects public policy. A direct motive, it is said, is given to the contracting parties; on the one hand, to lower the prices of Government opium, and so to diminish the public revenue; on the other hand, unduly to enhance prices, and so to injure the consumer by raising the fair market value of the commodity.

Now, before examining this argument in detail, some general observations may be made, which seem to me to shew that the inquiry ought not to be gone into at all.

It is obvious that a consideration of this argument necessitates an investigation of the various causes which influence prices. In order to ascertain what the tendency of speculations upon prices may be, an extensive knowledge is required of the doctrines relating to supply and demand, to monopoly and competition, besides a large induction from the facts connected with the particular commodity in question. I hold

that these inquiries are wholly foreign to the province of a Court of Justice.

It is possible, certainly, that a Judge may be a great political economist; and a distinguished predecessor of ours happened to be one of the first of his day: but no one would think of deferring to the opinion of the Bench on a question of political economy, any more than on a disputed point in geology or agricultural chemistry. The answer to arguments founded on this basis, therefore, is, that these are not considerations for lawyers to entertain.

Their province is, to give effect to the rights and obligations which individuals create amongst one another by their private contracts and agreements. On broad legal principles, and as a general rule, individuals have a right to enter into whatever contracts they please; and it is the office of Courts of Justice to enforce fidelity to such engagements, except in certain specified cases, where the exceptions are as well known as the rule. The Legislature has often seen reason to interfere with such contracts, whenever it finds or considers that the public interests are injured by any particular class of dealings, and full notice is given to the world of what the forbidden contracts are. But Judges have not the same materials before them as the Legislature for forming sound notions on public policy; and, fortunately, we have the light of experience to guide us in pointing out the extreme danger which is incurred when Courts of Law go out of their path, and found their decisions, not on solid juridical grounds, but on their own imperfect notions of what public policy requires. The common law can scarcely boast of two abler men within its own particular sphere than LORDS KENYON and TENTERDEN; and yet when they assumed to apply their notions of public policy to the contracts between man and man they laid down doctrines that made the whole commercial world tremble, and which the veriest tyro in political science would now repudiate. In *Rex* v. *Waddington*, 1 East, 143, LORD KENYON convicted a respectable merchant to four months' imprisonment and a thousand pounds fine for certain mercantile operations which are carried on every day by every individual in commerce, and which it is indeed the peculiar and beneficial province of a merchant to undertake. Mr. Waddington, it seems, was an extensive merchant, and having a quantity of hops on hand he considered,

on what appears to have been sound mercantile reasoning, that the prices were ruinously low: he calculated the amount of stock in the hands of the brewers, with the forthcoming supply, and came to the conclusion that the prices must speedily rise, and that undue causes had depressed them. He acted upon his convictions, stated openly in the market his reasons, and bought hops largely, with the avowed object of raising the market price. For these acts he received the punishment I have before mentioned; and LORD KENYON laid down the following doctrine: "It has been said, that if practices such as these with which this defendant stands charged are to be deemed criminal and punishable the metropolis would be starved, as it could not be supplied by any other means. I by no means subscribe to that position. I know not whether it is supplied from day to day, from week to week, or how otherwise; but this is to me most evident, that in whatever manner the supply is made, if a number of rich persons are to buy up the whole or a considerable part of the produce from whence such supply is derived, in order to make their own private and exorbitant advantage of it to the public detriment, it will be found to be an evil of the greatest magnitude; and I am warranted in saying that it is a most heinous offence against religion and morality, and against the established law of the country."

Here, then, is a doctrine which would bring within the pale of the criminal law nearly every merchant in the realm; yet LORD KENYON tells us, in the same judgment, that he had read through Adam Smith's work, in order to form sound views upon the subject! LORD TENTERDEN went equally far wrong in a case to be mentioned presently, by his speculations, founded on his own particular views of public policy. When, therefore, we have such flagrant examples as these before our eyes, I accede most cordially to the observations urged at the Bar against the impropriety of Courts of Law founding their judgments on considerations of public policy, upon which the Legislature has not thought fit to pronounce; and I had considered the strong observations made on this point by such distinguished living Judges as BARONS PARKE, ALDERSON, and MAULE, in a case, *Hebblewhite* v. *M'Morine*, 5 Mee. & Wels. 462, very parallel to the present, as having completely disposed of any argument to be raised on this score.

This argument, however, has been strongly urged at the Bar, and

the present case, it would seem, is to be disposed of upon it. It behoves me, therefore, to consider it somewhat closely.

These time bargains, it is said, are contrary to public policy, because they have a tendency to stimulate the contracting parties to commit offences with regard to prices. The party who has an interest in a low price ruling has a direct motive supplied him to prevent persons, by any illegal means he may devise, from becoming purchasers; the other party has a motive equally direct to form illegal combinations to raise prices; and it is quite immaterial whether such results follow or not, as it is sufficient for the argument that such is the tendency of the contracts in question.

I cannot help observing that I always suspect a fallacy is lurking in the ratiocination where I see some particular word introduced, and harped upon, and twisted into every possible shape. Reasoning is so apt to degenerate into verbal disputation, that the greatest care is necessary to prevent oneself losing sight of sense and ideas in vain discussions upon the mere counters which represent thought. Thus the present argument resorts to the word "tendency" at every step, and indeed does not seem to be able to frame any distinct proposition without the employment of the term. But as "tendency" is not a technical law term of conventional value, it must represent a distinct idea as applicable to this argument, which, if it has any precise and uniform meaning, is capable of being translated into other language. Let us see, then, what this idea is. If the contracts in question are adverse to public policy, it must be either because the effect of them, upon the whole, is to lower prices, and so to diminish the public revenue, or to raise prices, and so to injure the consumer. It is quite clear that the contracts cannot produce both these results, though it is possible they may produce neither; and yet both these results are pointed at as proofs of their evil tendency. The argument in question also draws a distinction between public policy and public interest, which is notable, and indeed novel; but the argument does not pause to explain the apparent collision, but contents itself with simply alleging, that, if prices are lowered, the first is affected; if they are raised, the latter.

Now with respect to the public revenue, it is so obvious that the general results of these contracts may be to raise the revenue, that it is

impossible, when the argument is carefully analyzed, to say they are injurious to public policy on that score, and accordingly this branch of the argument was very faintly insisted upon at this Bar.

With regard, then, to the public interests, the question is, whether the consumer, in point of fact, is injured by these speculations; for if, on the whole, these contracts should turn out to have operations on his interests, or to have even a beneficial operation, by steadying prices, it would seem a monstrous conclusion to arrive at, that the contracts are void, on public policy, on account of their evil tendency to produce all sorts of possible or impossible offences. Now the effect of speculation on the market is a very difficult question to decide. Say that prices are ultimately governed by the relation between supply and demand, the adjustment between these two is no doubt regulated by the opinion of the day, and on this opinion every idle rumour and immaterial event operates more or less strongly. A large portion of mankind is credulous, weak minded, or desponding; and when these persons happen to be holders of saleable commodities a rush is made into the market to sell on the slightest cause that appears to them portentous. Another class comprises the sanguine and the head-strong, who never lose confidence in their star, and whose tendency is to operate exactly in the contrary direction; and then a third class, perhaps, the select few of the community, stands by and profits by the faults of either. Thus speculation, and even time bargains, may on the whole operate to prevent prices from being unduly affected by either needless fears or exaggerated hopes.

The defendant, however, contends that it is immaterial for him to point out what the probable results of these time bargains may be, and that it is sufficient for him to shew that they have a tendency to produce illegal and improper acts on the part of the contracting parties; and he relies on *Evans* v. *Jones*, 5 Mee. & Wels. 77, and *Gilbert* v. *Sykes*, 16 East, 150. But answer to these two cases is simple: in each of them the Court was able to see its way to the conclusion that the particular contract was injurious to the public interests; in this case the Court does not possess materials for forming such a conclusion. No lawyer will doubt, I think, that *Evans* v. *Jones*, which was a bet relating to the conviction of a third party, was properly decided. None are more fitted than Judges to decide what acts are likely to induce witnesses to commit perjury, and to interfere with the due administration of justice. I think that the

bet on the life of Napoleon was, perhaps, also well decided, though I doubt whether the reasons of the learned Judges are not somewhat far-fetched and unsatisfactory. One Judge, for instance, held the bet to be void, on the ground that the Yorkshire baronet who made it had an interest to assassinate Napoleon; another Judge assigned as his reason that the other betting party, the clergyman, had an interest not to kill Napoleon, in case of his invading the country as an enemy; and a third Judge held that the bet was bad on neither of these grounds, and indeed that it was a valid contract. Still, in both these cases the majority of the Court found their way to a conclusion based on public policy. But in the present case, as I said before, the Court is not able to see what the evil tendency of these time bargains is; and I say this on the authority of *Hibblewhite* v. *M'Morine*, 5 Mee. & Wels. 462, *Wells* v. *Porter*, 3 Scott, 141, 2 Hodges, 42, 2 Bing. N. C. 722, *Morgan* v. *Perber*, 3 Bing. N. C. 457, 4 Scott, 230, 3 Hodges, 3, and *Oakley* v. *Rigby*, 2 Bing. N. C. 732, 3 Scott, 194.

I do not forget the able arguments which *Mr. Crawford* addressed to the Court, as to the evil consequences to trade which these contracts might produce; and the frauds, such as that committed in *Levi* v. *Levi*, 6 Car. & P. 239, and *Lord Cochrane's* Stock-exchange transaction, to which they might give rise. These possible results were eloquently pointed out, and I do not think they could have been placed more forcibly before the Court; but they have all been addressed in equally forcible terms to the Courts at home, and in vain.

Lord Tenterden held that time bargains were attended with the most mischievous consequences, and in *Bryan* v. *Lewis*, 1 R. & M. 386, and other cases, disallowed them; but his decisions have been expressly overruled. *Mr. Tomlinson* to the Court of Exchequer, and *Sergeant Manning* and others to the Court of Common Pleas, placed the subject in every possible view; and scarcely any question of the day has received more judicial consideration. I therefore think I am justified in holding that the Courts of Law are unable to pronounce judicially that time bargains are injurious to public policy.

It only remains for me to observe, that throughout this discussion I have treated time bargains and wagers, such as that now before us, as identical. Any consideration of public policy which would make the one invalid would apply with equal force to the other; and it was therefore with the

soundest logic that LORD TENTERDEN classed them under the same category in *Bryan* v. *Lewis*, 1 R. & M. 386. But, moreover, the identity of the two contracts has been specially brought to the notice of the Court in *Wells* v. *Porter*, and *Oakley* v. *Rigby*, when the defence was, that the time bargains for the delivery of stock were in fact mere wagers, and it was held to be an immaterial distinction. And it is quite obvious to any one who knows any thing of stock-exchange transactions that these operations at Bombay are, in fact, exactly the same as those which take place in London. The same wants, the same passions, the same occupations, lead men, both in the East and West, into similar transactions, although a different garb and form may clothe their contracts as well as their persons: '*facies non omnibus una, nec diversa tamen*,' as we have constantly occasion to observe when we come to compare Native with European transactions.

And thus, in the present case, the contract to pay seventy-five times the difference on a fixed price of one chest of opium, and the price at a future day, is in substance the same contract as a purchase of seventy-five chests at that price, where the delivery is to be made at a future day. And so, also, the paying a sum of money down on the promise of the other party to pay five times the difference on one chest if it exceeds so much, is the common stock-jobbing operation of paying a premium for the liberty of calling for so many chests on a certain day, if the price should attain the amount agreed upon.

And, lastly, if a distinction were to be taken between this wager and an ordinary time bargain, it would be at once evaded by speculators throwing all their wagers into the form of the latter.

I regret the great length into which I have been led unavoidably to set out the grounds which have compelled me to differ from the CHIEF JUSTICE; and it is a great satisfaction to me to think, that, if they are erroneous, they can do no harm; whereas, if they are sound, they may facilitate the parties in their endeavours to get them confirmed by a higher tribunal.

Judgment of the Honourable SIR DAVID POLLOCK, C. J.

This is the case of a wager of a very peculiar description on the price of opium, to be determined at the Government sale of Patna opium,

which should take place next after the making of the wager. I have considered the question raised upon the demurrer in all its bearings, and the numerous cases, which are to be found applicable to the subject; and the result in my mind is, that the wager in question is void, in consequence of its being contrary to the principles of sound policy; and that, therefore, there ought to be judgment for the defendant. I regret that my opinion should not coincide with that of my learned brother; but I cannot but think, that unless it is to be considered that in the case of time bargains, where the Courts have upheld them, although in some cases agreed upon as wagers, and admitted so to be, the decisions are to be taken as having concluded all arguments on such matters (as my learned brother has very broadly thrown out). This case is so distinguishable in its tendency from all that has preceded it as to leave it open to the Court to adopt a contrary decision, in perfect conformity with the general principles which all the Courts have dwelt upon very strongly, and have been disposed to uphold in every practicable instance. It is undeniable that wagers have been uniformly discouraged by our Courts in England; but as the legality of wagers, unless brought within the exceptions which have been raised from time to time, has been too often recognized to be now successfully questioned, it remains to be considered whether the present wager, from its very nature and obvious tendency, is not so completely against the public interest as to bring it within the exception of being contrary to sound policy. It is unnecessary to consider the various objections which have led the Courts to declare certain wagers illegal, except, perhaps, for the purpose of proving that the decisions have proceeded upon the tendency of the wagers themselves, quite irrespective of the parties to them; but that, however improbable it might be that any illegal act would be committed by the parties to secure a victory, yet, if the wager had a tendency to produce the commission of such acts, it was held sufficient to avoid it. Thus in the case of *Gilbert* v. *Sykes*, 16 East, 150, which was a wager upon the duration of the life of Napoleon Bonaparte, and was held to be illegal and void, as tending to the assassination, or other violent death, of the subject of it, the Court never could have acted upon the idea that either the plaintiff, who was a clergyman, or the defendant, a well-known and honourable person,

could be suspected of promoting such a mode of terminating their engagement to each other. But this, and all the other similar cases, have been decided entirely upon the consideration of the consequences to which such a wager tends. It was upon the same principle that the decisions took place in *Cole* v. *Gower*, 6 East, 110, and *Hartley* v. *Rice*, 10 East, 22. I also pass by the decisions upon gambling in the funds, because that was the subject of an Act of Parliament; and that Act being silent on the subject of foreign funds, it followed, of course, that any transactions respecting them were not within the Statute.

The cases on which the plaintiff's counsel having mainly relied are those in which the dictum of LORD TENTERDEN, at *Nisi Prius*, in *Bryan* v. *Lewis*, 1 Ryan & Moody, 386, has been questioned and overruled, and a principle established that time bargains for goods may be enforced, even if they are admitted by the parties to be mere wagers, provided they do not come within the established exceptions. The strong cases upon this point are those of *Hibblewhite* v. *M'Morine*, 5 Meeson & Welsby, 462, and the cases there quoted; and it must be admitted that the decision of *Hibblewhite* v. *M'Morine* has settled that a time bargain for goods, or even a wager respecting their price, is not illegal, unless brought within the exceptions, one of which is, that it is contrary to sound policy. I am of opinion that, by the numerous wagers laid by the plaintiffs with various parties, two of which only have been argued before the Court, the natural consequence or tendency in the plaintiffs was, to influence the next Government sale of opium, upon which the decision of the wager depended, by some contrivance by which the price should be enhanced beyond the marketable price, and the higher the sum at which the opium should be sold, the better would it be for the plaintiffs, as the interest they had created by the wager was, that they were to receive, in one case five, and in the other case seventy-five, times the amount of the difference between the current or real value of the opium and the price at which it should be sold at such Government sale. Was, therefore, such an interest contrary to sound policy, or not? The extent to which cupidity will go to secure an advantage was strongly evinced in a case that has not been quoted at the Bar, but which, I think, furnishes, in the judgment of the Court, composed of very able

Judges, a guide to the decision of the present case, upon the broad principles of public policy. I allude to the case of *Rex* v. *De Berenger and others*, 3 Maule & Selwyn, 67. The defendants were indicted and convicted of a conspiracy to occasion, without any just or true cause, a great increase and rise of the public Government funds and Government securities of this kingdom; and in the judgment of the Court, upon a motion in arrest of judgment, LORD ELLENBOROUGH says: "The purpose itself is mischievous: it strikes at the price of a vendible commodity in the market;" and although the gist of the offence of which the defendants stood convicted was, effecting their mischievous object by spreading false rumours, yet the Court appears to have entertained no doubt as to the mischievous effects of interfering improperly with the price of a vendible commodity in the market, as being contrary to sound policy; and in his judgment DAMPIER, J., says: "The means used are wrong: they were false rumours. The object is wrong: it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase." This case, therefore, completely establishes the principle, that to give a false price by raising it is contrary to sound policy, while the decision of *Levi* v. *Levi*, 6 Carrington & Payne, 239, affords a similar decision with regard to the illegality of an interference with the free course of an auction, by a combination to lower the prices. Now, to apply these principles to the present cases, which the Court is entitled to consider as two of a large number pending before us, in which the same plaintiffs appear in all, the large interest thus created, almost in an infinite number of times, of the difference between the price of opium fixed in the wager and that at which the declaration alleges the average price per chest to be upon the first Government sale, clearly shews, that so large a pecuniary interest is created in the plaintiffs to raise the price, that the tendency would naturally be to impel them to adopt measures for raising the price very extensively. This appears to have been effected by some means or other; for it cannot be presumed to have occurred naturally. Such a consequence, by creating so high and fictitious a price, might, and in many instances would, inevitably have the effect of paralysing the market, of creating a convulsion in the opium trade generally, which would disable many from completing those

engagements, which, in the management of commercial concerns, those who deal in opium would have been justified in entering into, relying upon the fair competition which usually takes place at such public sales as that in question, with *bonâ fide* biddings by merchants engaged in that branch of trade, and unaffected by the adventitious though extensive interest created by a gambling wager. It appears to me that such consequences are too probable to be doubted about, and might produce all the pernicious effects of bankruptcy, insolvency, or ruinous loss among the members of the opium trade. The plaintiffs (if the wager could be enforced) would be perfectly secure, even if they, in order to win the wager, became the purchasers of all the opium; for the receipt of the multiples of the difference from the various parties with whom they have betted would indemnify them for such an infringement, as I think it, of the right of the public. Upon the ground, therefore, that the natural tendency of these wagers is contrary to sound policy, I am of opinion that they are illegal, and cannot be supported.

I have refrained from referring to many of the cases cited at the Bar, such as *Da Costa* v. *Jones*, 2 Cowper, 729, *Evans* v. *Jones*, 5 Meeson & Welsby, 77, and others, as having been decided upon points of objections which do not arise here, but which serve to shew how ready the Courts have always been to repress wagers when they could legally do so. And I may also remark, that the reasoning of MR. JUSTICE BULLER, in the case of *Good* v. *Elliott*, 3 T. R. 693, although overruled by the majority of the Court, has been largely imported into the grounds on which subsequent cases have been decided; and it has been, among lawyers, a subject of general regret that the case of *Good* v. *Elliott* had not been decided the other way.

There will, therefore, be judgment for the defendant.[1]

Herrick afterwards appeared on behalf of Ramlall and others, to make an application in respect of the costs. Nothing had been said when the judgment was delivered as to the costs of the demurrer, but he believed the rule was, that when the Judges differed the case was decided without costs.

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[1] The late learned CHIEF JUSTICE's judgment in this case was reversed on appeal by the Judicial Committee of the Privy Council, on the 28th February 1848, and the judgment of the Honourable SIR ERSKINE PERRY, C. J., was upheld.

Both the learned Judges observed, that the established practice of the Court in such cases appeared to have been, that each party should pay his own costs, although it certainly seemed fair that the winning party should be exempted from the payment of costs. As it had been the usual course, however, that where the Puisne Judge differed no costs should be allowed to either side, it must be pursued on the occasion.

No. XIX.

AGA MAHOMED JAFFER

versus

MAHOMED SADICK.

11th October 1847.

Judgment of the Honourable Mr. Justice Perry, Acting C. J.

In the case of the Sheriff's bailiff, who has been imprisoned at Nassick under a writ of the Sudder Amín, respecting some property which he seized by virtue of a writ issuing out of this Court, and in which *Mr. Wallace* applied for a rule under the Interpleader Act, calling on the Nassick creditor to shew cause here as to his claim to the property seized, I have also been applied to by the Assistant Judge of Nassick to indorse his process, calling upon the Bombay creditor, Aga Mahomed Jaffer, to defend the suit in the Nassick Court.

Questions which involve any possible collision of Courts are attended with such unpleasant results, that every friend of Government must deprecate seeing them raised unnecessarily, and must desire, when they are unavoidably brought forward, that a clear intelligible rule should be forthcóming, by which they may be disposed of before passion and intemperance have arisen on either side.

I have thought it best, therefore, to point out, at this early stage, what the rule of the English law is, in order to prevent a collision between co-ordinate Courts.

The facts in this case seem to be as follows:—

The Bombay plaintiff brought an action against a Bombay defendant, and received a verdict for about Rs. 20,000. Before judgment was signed the defendant had removed his property, consisting of horses, to

Nassick, where, during the rains, a better climate and cheaper food are procurable. The plaintiff, on discovering this fact, obtained the process of the Supreme Court, and seized the defendant's horses at Nassick; and on the Sheriff's bailiff having done so, a Nassick creditor comes forward with an alleged mortgage on these horses, and obtains from the Sudder Amín a warrant to arrest the bailiff in a suit to recover their value. The horses are brought to Bombay; the bailiff remains in durance; and the Nassick creditor and the Bombay creditor are now each anxious to have the question as to the right to these horses determined in the respective Courts of their own domicile.

Now, on these facts there can be no doubt that if the Sudder Amín had any discretion to exercise, he has acted indiscreetly in allowing this bailiff to be arrested. No complaint seems to have been made as to the mode in which the bailiff executed this writ: he was merely acting as a servant for an absent principal, and as an officer under the special authority of this Court; and he would have been punishable if he had not so acted. This is not the mode in which the officers of a Court of Justice should be dealt with on a question of property by a co-ordinate Court, much less by the Court of the Sudder Amín, with respect to an officer of the Supreme Court. If the Sudder Amín had the power of obtaining the opinion of the Zillah Judge, or of the law officers of Government, on a novel case, for which no guide is to be found in the Regulations, I feel no doubt that he would have been counselled to have nothing to do with the suit.

The *Advocate General* would have told him that the cases are numerous, clear, and specific, in England, to shew, that, where Courts of exclusive jurisdiction exist, they have been in the habit of preventing other Courts from interfering with their jurisdiction. No Court of superior jurisdiction will allow the conduct of its officers to be canvassed in another tribunal. The Court of Exchequer, the Court of Common Pleas, the Court of Chancery, always interfere if any other Court, though of equal power with themselves, entertain a suit respecting the conduct of their officers. (Read the cases collected by LORD CAMPBELL, in *Stockdale* v. *Hansard*, 1 Ad. & Ell. 1, 4 Jur. 68.)

This being, therefore, the clear principle in the English law, the question is, how to apply it in India. Where the Supreme Court has

jurisdiction in the Mofussil it executes its processes by its own officers. Any interference with the execution of such processes is a contempt of this Court, and the party so interfering may be proceeded against by attachment. To bring an action against the officer who executes the processes is an interference with the processes, and the party who brings the action may be committed for a contempt; and so, also, any parties who assist in the bringing of the action, such as the officers of the Sudder Amín, who make the arrest, may be themselves imprisoned. The power of this Court depends, therefore, entirely on the exercise of physical power against those who invade the well-recognized principle of law.

Thus, in *Brass Crosby's case*, 2 W. Black. 754, 3 Wils. 198, where the Lord Mayor of London committed an officer of the House of Commons for a trespass in executing its processes, the House of Commons committed the Lord Mayor to Newgate; and four Judges of the realm, comprising LORD CHIEF JUSTICE DE GREY and SIR WILLIAM BLACKSTONE, held that the Chief Officer of the City of London was properly committed.

There appears to me, therefore, to be no doubt that the Nassick plaintiff might be committed by this Court for a contempt. It may be a matter of hardship that a *bonâ fide* mortgagee should have to come down to Bombay, a hundred miles distant from his house, to prosecute his rights: on the other hand it would be a much greater hardship to a Bombay creditor if the processes of this Court could be defeated by the mere setting up of a native mortgagee, which, we may be sure, would never be wanting if it be discovered to be an effectual instrument for frustrating the execution of the Supreme Court. The case, however, is not to be disposed of by the consideration of the hardship on either side, but by the rule of law applicable.

From the principles which I have stated, it is quite clear that the Supreme Court is the forum in which the Bombay plaintiff is entitled to have his rights determined. I therefore have no difficulty in determining to refuse my indorsement to the process of the Assistant Judge, which summons Aga Mahomed Jaffer to Nassick. With respect to *Mr. Wallace's* application I have more difficulty. He demands that the Nassick plaintiff should be summoned to Bombay to support his claim, because the subject-matter, the horses, are in Bombay. I doubt

whether, as the subject-matter is moveable property, this affords any ground for jurisdiction.

But the Interpleader Act states, that if any party makes any claim to property seized by the Sheriff, such party may be called on by the Court to maintain or abandon his claim.

The words are quite large enough to include the Nassick claimant, and I do not at present see any thing in the spirit of Indian legislation to prevent the words having their full effect. I think, therefore, that *Mr. Wallace* may have a rule *nisi*, to be served at present on the *Advocate General* only. This will give an opportunity of considering the last question; but, above all, it will call the attention of Government and its law officers to the subject, and will enable them to take the sound course which discretion, and the powers vested in them, may warrant or dictate.

No. XX.

CASE OF THE KOJAHS AND OF THE MEMON CUTCHEES.

11th Oct. 1847.

Judgment of the Honourable SIR ERSKINE PERRY, Acting C. J.

The question which has arisen in the cases of the Kojahs and of the Memon Cutchees is founded on such similar states of fact, and depends so entirely on the same principles of law, that it may be conveniently disposed of in one judgment.

The facts in the Kojah case are as follows:—The plaintiff Hirbae and her infant sister were the only children of Hadjebhae Mir Ali, late a merchant in Bombay, who died intestate, leaving behind him a widow, Sonabae, and property consisting of land and moveables, said to be worth three lacs of rupees. He had carried on trade at this place with his brother, Sajum Mir Ali; and the latter, on his brother's death, took possession of his property, which he retained till he himself died in 1843, when he left a will appointing his sister-in-law, Sonabae, and his wife, Rahimatbae, his executrixes.

The plaintiff now files her bill against these executrixes, the object of which bill is, to obtain a declaration from the Court that she, as a Muhammadan female, is entitled to the share in distribution of her father's

property which is ordained in the Korán. The defendants meet this demand by a plea that all the parties to the suit belong to a certain exclusive sect or Cast of Muhammadans called Kojahs, which has existed from time immemorial separate and distinct from other bodies or sects of Muhammadans, and under the government of divers laws and customs peculiar to themselves, and differing in many respects from the laws and customs of the Muhammadans: and the plea then avers a custom in the Cast, by which females are not entitled to any share of their father's property at his decease, nor to any benefit whatever, except, if they should be unmarried, to maintenance out of the estate, and to a sufficient sum to defray the expenses of their marriage according to their condition in life.

A replication having been put in to this plea, application was made to the Court, in pursuance of a very general feeling amongst the profession at Bombay as to the superiority of *vivâ voce* testimony over evidence obtained in the Examiner's office, to grant issues for the purpose of testing the plea; and accordingly three issues were directed, which, in substance, raised the question, whether a good and valid custom existed amongst the Kojahs to the effect stated in the plea.

These issues came on for trial before me on the 19th and 20th June last, and a great many witnesses, comprising the chief and most intelligent members of the Kojah Cast, were examined, who told us all that they appeared to know themselves respecting their origin, history, habits, and religious opinions. It turned out that there was little or no conflicting testimony as to the existence of a custom such as is stated in the plea; and as the principal question then arose whether such custom was valid or not, I thought it best, at the conclusion of the trial, to deliver no opinion on the law of the case, but to leave that open for discussion at a future stage of the inquiry on the facts which had been proved before me on that occasion, and of which the following is a sketch.

The Kojahs are a small Cast in Western India, who appear to have originally come from Sindh or Cutch, and who, by their own traditions, which are probably correct, were converted from Hindúism about 400 years ago by a Pír named Sudr Dín. Their language is Cutchí; their religion Muhammadan; their dress, appearance, and manners, for the most part, Hindú. These latter facts, however, do not warrant the

conclusion being drawn, if such conclusion is necessary for the decision of the case (and I think it is not), that the Kojahs were originally Hindú; for such is the influence of Hindú manners and opinions on all Casts and colours who come into connection with them, that gradually all assume an unmistakeable Hindú tint: Pársís, Moguls, Afgháns, Israelites, and Christians, who have been long settled in India, are seen to have exchanged much of their ancient patrimony of ideas for Hindú tones of thought; and in observing this phenomenon, I have been often led to compare it with one somewhat similar in the black soil in the Deccan, which geologists tell us possesses the property of converting all foreign substances brought into contact with it into its own material.

However this may be, the Kojahs are now settled principally amongst Hindú communities, such as Cutch, Kattiwar, and Bombay, which latter place probably is their head-quarters. They constitute, at this place, apparently about two thousand souls, and their occupations, for the most part, are confined to the more subordinate departments of trade. Indeed, the Cast never seems to have emerged from the obscurity which attends their present history; and the almost total ignorance of letters, of the principles of their religion, and of their own *status*, which they now evince, is probably the same as has always existed among them since they first embraced the precepts of Muhammad.

Although they call themselves Musulmáns, they evidently know but little of their Prophet and of the Korán; and their chief reverence at the present time is reserved for Ághá Khán, a Persian nobleman, well known in contemporaneous Indian history, and whom they believe to be a descendant of the Pír, who converted them to Islám. But even to the blood of their saint they adhere by a frail tenure; for it was proved, that when the grandmother of Ághá Khán made her appearance in Bombay some years ago, and claimed tithes from the faithful, they repudiated their allegiance, commenced litigation in this Court, and professed to the *Kází* of Bombay their intention to incorporate themselves with the general body of Musulmáns in this island. To use the words of one of themselves, they call themselves *Shías* to a *Shía*, and *Sunníys* to a *Sunníy*, and probably neither know nor care any thing of the distinctive doctrines of either of these great divisions of the Musulmán world. They have, moreover, no translation of the Korán into their vernacular

language, or into Guzaratí, their language of business, which is remarkable when we recollect the long succession of pious Musulmán kings who reigned in Guzarat, and in the countries in which the Kojahs were located. Nor have they any scholars or men of learning among them, as not a Kojah could be quoted who was acquainted with Arabic or Persian, the two great languages of Muhammadan literature and theology; and the only religious work of which we heard as being current amongst them was one called the Dees Avatar, in the Sindhí character and Cutchee language, of which Narayan the interpreter has procured me some translated passages, and which, as professing to give a history of the tenth incarnation in the person of their Saint, Sudr Dín, appears to be a strange combination of Hindú articles of faith with the tenets of Islám.

No other fact of any material bearing on the case was proved; but the defendants brought forward evidence to shew that Hirbae, the complainant in one case, and her cousin Gungbae, the complainant in the other, had received jewels from the executrixes of Sajun Mir Ali, which, it was contended, amounted to a recognition and confirmation of the will of the latter, according to the rules of Muhammadan law. But as I was clearly of opinion, on looking at the sex, the tender age, and the helpless condition of these young women, that the simple act of receiving jewels tendered to them by their elders in the family amounted to no compromise of their just and legal rights, the fact may be passed over without further notice.

When this case was standing over for judgment, a suit was instituted in relation to the Memon Cutchee Cast, in which it was intimated that exactly the same question arose.

In this case, also, a suit was instituted by Memon Cutchee females, praying for a distribution of the paternal property in accordance with the text in the Korán, and a plea of exactly the same import as in the Kojah case, of a peculiar custom existing amongst the Memon Cutchees, was filed, upon which *vivâ voce* evidence was taken before me, by consent, in the last term.

Amongst the Memon Cutchees it was also clearly proved that the custom of excluding females from the inheritance prevailed amongst them exactly as it does amongst Hindús. The Memons were originally, and

still are, seated in Cutch, from which they have spread themselves into many of the adjoining countries in Western India, and, by their own account, even into Malabar and Bengal. By their traditions they were originally Loannas, a Hindú commercial Cast in Cutch; but they are not able, and no records are forthcoming, to indicate the period of their conversion, although there is every reason to believe it must have been some hundreds of years ago. They may be characterized as being more orthodox Muhammadans than the Kojahs, and in being in every way their superiors, so far as health, numbers, and learning are concerned. They make the pilgrimage to Mecca, which is unknown among the Kojahs; and a branch of the Cast, the Hala Memons, who are settled in Kattiwar, are said to observe every portion of the Muhammadan law, including the injunctions as to the division of an inheritance.

These facts having been established, the first question which arises is, whether the peculiar custom of succession which has prevailed from time that may be called immemorial amongst these Casts can be sanctioned in a British Court of Justice? and secondly, it has been made matter of grave argument, whether any custom conflicting with the express text of the Korán can be valid amongst a Muhammadan sect? The importance of these questions, both to the Casts themselves, from the large pecuniary as well as social interests involved, and also as regards other Casts and Courts in the interior, from the universality of the principles involved in the argument, has caused me to apply myself to the inquiry with more than usual anxiety: and as it is unlikely, from the magnitude of the stakes at issue, that the parties against whom I have formed a conclusion will be satisfied with my decision, I am studious to set out the grounds of it fully, so as to enable a superior Court to judge of its validity.

1. It may be perhaps laid down that it is a matter of comparatively little interest to the commonwealth how the affairs of private individuals are conducted among themselves. So long as the public interests do not require a uniform line of conduct to be observed or refrained from, or that the heedlessness of individuals in the regulation of their own affairs does not make it expedient to lay down some arbitrary rule to govern in contingencies which they themselves have not foreseen, a wise Legislator is slow to interfere. In every well-ordered community it is

essential to its peace that clear and certain rules should exist as to the various relations of domestic life; and in every early history it will be found, that as to most of these, such as marriage, succession, adoption, as well as to the various occupations, agricultural, pastoral, or mercantile, which may happen to prevail in such society, the exigencies of man have framed rules long before written laws existed. A considerable body of law thus arises in every state; and the Legislator, when he is required to enter upon his task, rarely seeks to interfere with regulations which the habits and manners of the people have spontaneously adopted. In the English system two arbitrary rules arose, partly from this source and partly from judicial decision, for the division of property, in order to provide for the contingency of an individual dying either without children or with more than one. But the mere fact of two completely different rules being in existence for the division of real and personal property (a difference traceable to historical causes) clearly shews that no principle of public policy has called forth any universal law. The same proposition is demonstrable by the various local customs of succession which have always been allowed by the English law, but still more by the provision which has existed from very early times, whereby every individual is allowed to make a law, *à privilegium*, for himself, by which the succession to his property after his death is absolutely governed. I allude to the power of making that instrument called a will, to which, if formally authenticated and prepared, the Courts of Justice will attribute the same dispositive power over property as to an Act of Parliament.

Principles such as these will in great part account for the large share which customary law, as it is called, *mores majorum*, or *jus consuetudinarium*, will be found to hold in most codes. In some cases the wisdom, but in most the indifference or want of skill, of the Legislator has left mankind to frame their own rules for the conduct of daily life; and when such rules grow up into a custom, we may see by the present cases that it is often more difficult to change it than even the peculiar religion out of which it perhaps arose. A considerable difference of opinion exists amongst jurists as to what the foundation of this customary law is. The Roman lawyers, and SIR WILLIAM BLACKSTONE following them, hold that the common consent of the people, or of any particular

class of the people, gives to any custom the validity of a law *per se*; and the Romans held this with much apparent logic: for as a *plebiscitum* in the time of the Republic formed a valid law, they argued "*quid interest, suffragio populus voluntatem suam declaret, an rebus ipsis et factis.*" Dig. Lib. I. tit. 3. L. 32. § 1. Other great lawyers hold, and I think with juster views, that a custom is not valid as a law until it is recognized by the established tribunals of the country. And as it is very important in the present controversy to ascertain whether the custom in question can be based upon any recognized legal foundation, I think it is worth while to cite the ablest expositions I am acquainted with of the two conflicting doctrines.

A great modern civilian writes as follows:—

"Where a class of persons by common consent have followed a rule intentionally, whether by positive or negative acts, a law arises out of this public common consent for each person belonging to the class, provided that the custom is not unreasonable, and applies to matters which the written law has left undetermined. Customs conflicting with the law are not valid in the Roman system, unless they have been recognized by the ruling authority, or have been in use from time immemorial, and this whether their effect may be to repeal a law by disuse (*desuetudo*), or to introduce a new principle at variance with the law; and their being confirmed even by judicial authority does not give them validity in the latter case." (On this point, however, I may observe there is much conflicting opinion amongst civilians.) "A custom, therefore, to hold good in law, requires, besides the above negative conditions, the following positive condition, namely, that the majority, at least, of of any given class of persons look upon the rule as binding, and it must be established by a series of well-known, concordant, and, on the whole, continuous instances. How many examples are necessary to prove a custom cannot be laid down beforehand, neither is the number to be left to the arbitrary discretion of the Judge; but the point in each case is, whether the common consent of the class in question is clearly demonstrated by the number of instances proved.

"A custom complying with the above conditions is binding in itself, and does not require either the special recognition of the ruling power, or its confirmation in Courts of Law, or the efflux of any long period of

time, definite or indefinite; least of all does it require prescription, although either of these latter tends very much to prove the existence of the common consent; and from a uniform series of decisions common consent may be inferred." 1 Thibaut, System des Pandekten Rechts, p. 15.

Professor Austin, on the other hand, in his work on Jurisprudence, thus expresses himself:—

"Every positive law, or rule of positive law, exists as such by the pleasure of the sovereign. As such it is made immediately by the sovereign, or by a party in a state of subjection to the sovereign, in one of the two modes which are indicated by the foregoing article. As such it flows from one or another of these sources."

But by the Classical Roman Jurists, by Sir William Blackstone, and by numerous other writers on particular or general jurisprudence, the occasions of laws, or the motives to their establishment, are frequently confounded with their sources or fountains.

The following examples will shew the nature of the error to which I have now adverted:—

"The prevalence of a custom amongst the governed may determine the sovereign, or some political superior in subjection to the sovereign, to transmute the custom into positive law. Respect for a law writer, whose works have gotten reputation, may determine the Legislator or Judge to adopt his opinions, or to turn the speculative opinions of private men into actually binding rules. The prevalence of a practice amongst private practitioners of the law may determine the Legislator or Judge to impart the force of law to the practice which they observe spontaneously. Now, till the Legislator or Judge impress them with the character of law, the custom is nothing more than a rule of positive morality; the conclusions are the speculative conclusions of a private or unauthorized writer; and the practice is the spontaneous practice of private practitioners. But the Classical Roman Jurists, and a host of other writers, fancy that a rule of law made by judicial exposition on a pre-existing custom exists as positive law, apart from the Legislator or Judge, by the institution of the private persons who observed it in its customary state; and the Classical Roman Jurists have the same or the like conceit with regard to the rules of law which are fashioned by judi-

cial decisions on the conclusions or practices of private writers or practitioners. They ascribe their existence as law to the authority of the writers or practitioners, and not to the sovereign, or the representatives of the sovereign, who clothed them with the legal sanction." Austin on Jurisprudence, App. p. xi. London, 1832.

According to the Roman law, therefore, this custom of the Kojahs and Memons would be held to be valid in itself without any sanction by the Court, provided that it were reasonable, and that it did not conflict with any written law of the ruling authority.

According to the English law, as I conceive it, and to the sound principle of universal law, the custom would require the sanction of the Court, as representing the sovereign authority, before it obtained any legal validity. Both these theories, however, agree in this, that the custom must be reasonable, or, rather, not unreasonable, and that its reasonableness must be tested in a Court of Justice. In the present instance, accordingly, it has been stoutly argued that this Hindú custom of disinheriting daughters, which has been adopted by these Muhammadan sectarians, is most unreasonable, and that public policy would dictate the adoption of the wiser rule laid down in the Korán, by which daughters are allowed a defined share in the succession. A contrast is then drawn between the relative transitions which females hold in the Hindú and Musulmán systems; and it is argued that the policy of the latter is so much more enlarged and beneficial, that it is the duty of the Court to give it effect when the two come in collision. But I have often disclaimed in this Court any desire to decide private rights with reference to political results. "Public policy," in the words of Mr. Justice Burroughs, "is an unruly horse, and if a Judge gets upon it he is very apt to be run away with." Where public policy accords with the well-recognized track of morality, it is the duty of the Judge to make every decision conform to it, if the letter of the law permits; but where public policy is a matter of controversy, a lawyer should be the last to express any opinion upon it: and I hardly know any question connected with the East on which so much might be said on either side as on the different characteristics of the marriage state between Hindús and Musulmáns, and on the *status* in life and influence in domestic circles which Hindú and Musulmán females respectively enjoy. It is sufficient,

however, to say, that a custom for females to take no share in the inheritance is not unreasonable in the eyes of the English law; for it accords in great part with the universal custom as to real estates where there are any male issue, and entirely with some local customs mentioned in BLACKSTONE, by which, in certain manors, females are excluded in all cases.

But this custom has not only been attacked on the score of unreasonableness, but it has been tested by every one of the seven requisites which BLACKSTONE has laid down for the validity of an English custom. It may be asked, however,—and I did ask,—why the various special rules which have been laid down in any particular system, and some of which clearly have no general applicability, should be transferred to a state of things to which they have no relation? Why, for instance, the municipal rules of the English law are to govern a Muhammadan custom any more than the municipal rules of the Roman law? I apprehend that the true rules to govern such a custom are rules of universal applicability; and that it is simply absurd to test a Muhammadan custom by considerations whether it existed when Richard I. returned from the Holy Land, which is the English epoch for dating the commencement of time immemorial, or by cases such as that cited from 3 T. R. 371, to shew that it is a bad custom at Southampton to sell butter by the pound weighing 18 ounces. Least of all does the English rule which limits a custom to a particular locality apply to a Cast custom in this country. The English rule is founded, most probably, on the various local laws which the different monarchies in the Heptarchy, or the different races of conquerors, left behind them; but the customs of Casts are all eminently personal, and are as clearly traceable and distinct in one locality as another. But even in England the custom of London with regard to succession follows the person. 2 Vern. 82.

It appears to me, that if a custom has been proved to exist from time whereof the memory of man runneth not to the contrary, if it is not injurious to the public interests, and if it does not conflict with any express law of the ruling power, such custom is entitled to receive the sanction of a Court of Law.

2. This brings us to the second question in the case; for it has been

contended, and indeed the main stress of the argument has rested on this point, that however valid this custom might be in other respects, it can never have validity with respect to Muhammadans, as it is in conflict with the Divine law, as revealed to them by the Korán; that in this respect it is equivalent to a custom in England which conflicts with a subsequent Act of Parliament: and the passage from Thibaut also shews that the Roman law allowed of no custom if the *lex scripta* had laid down a rule on the subject.

This view of the question, as bringing the binding effect of divine law into discussion, opens up a very interesting field of inquiry, and one on which it becomes difficult to express oneself clearly, if any regard to conciseness is to be maintained. But in a judicial point of view I apprehend there is no difficulty in stating what the sound conclusions are.

A jurist *qua* jurist has only to deal with human laws: he recognizes the existence of divine laws, and their validity *in foro conscientiæ* with those to whom they are addressed, or who believe in the revelation containing them; but he does not recognize them as enforceable in Courts of Justice any further than the secular power has ordained. Under a Government such as that of England, which has established the principle of universal toleration as to religious belief, it is no doubt the duty of a secular Judge to pay the utmost respect to the religious opinions of every suitor who comes before the Court; and his judicial impartiality should be preserved within such inflexible limits, that, on every controversy which is capable of arising within the bosom of society, the opinion should be universally diffused, that a calm and just decision between the litigant parties would as surely issue from the judgment-seat as if it were occupied by a Judge of their own creed and colour. But the question on every such occasion for the Judge would be, what the law was which had been delivered to him for administration by his Sovereign.

When India fell to the arms of the British it was competent to the Legislature to have repealed the whole of the law which the greater part of the inhabitants considered divine. It might have been very intolerant and tyrannical to have done so, and most probably such laws would have had no operation on the custom and habits of the people,

though a very singular example to the contrary is to be found among the Jews of Europe. By the Jewish law, as it is clearly shewn by Selden and Lightfoot, polygamy on a very large scale was permissible; but the Roman Emperors Theodosius and Arcadius repealed the Jewish law of marriage, and thereby introduced the Roman law of monogamy, which has prevailed amongst the Jews, as amongst the Christians of Europe, ever since. Cod. Lib. 1. tit. 9. L. 7.

But whether an Act of Parliament introducing the English law of marriage and primogeniture would have succeeded in exterminating the practices of polygamy and division of property now prevalent in India, there is no doubt that if a question arose upon them before an English Judge, the rule laid down in the Act of Parliament would have to be enforced.

Wherever, therefore, a question arises as to the binding effect of a law believed to be divine by any peculiar Cast, the true inquiry for a Court of Justice is, how far that law has been recognized, or sanctioned, or adopted by the ruling power. In the present instance this question depends on the true construction to be placed on the following clause of our Charter, which contains the expression of the Legislator's will:—

"In the case of Muhammadans or Gentoos, their inheritance and succession . . . . . shall be determined, in the case of the Muhammadans, by the laws and usages of the Muhammadans; and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined by if the suit had been brought, and the action commenced, in a native Court."

Now if the meaning of this clause is that it is an absolute enactment or adoption of the Korán, as of a positive unchangeable law, without regard to what the usages of the Muhammadans of India, whether *Shías, Sunníys,* or sectarians, might have been, undoubtedly the custom set up in conflict with the text of the Korán cannot be sustained. But I think it is quite clear that the clause in question was framed solely on political views, and without any reference to orthodoxy, or the purity of any particular religious belief.

It was believed erroneously that the population of India might be classified under the two great heads of Muhammadan and Gentoo; and

the use of the latter term as a *nomen generalissimum*, which is unknown, by-the-bye, in any eastern tongue, or even in colloquial use, except in the Presidency of Madras, shews that the main object was to retain to the whole people lately conquered their ancient usages and laws, on the principle of *uti possidetis*. It may be questioned whether one individual in the Legislature,—with the exception, perhaps, of Mr. Burke,—was aware of the sectarian differences which distinguished *Shía* from *Sunníy*; and not even that great man, we may be assured, was at all conscious that there were millions of inhabitants in India such as Sikhs, Jains, Pársís, Hebrews, and others, who had nothing, or next to nothing, in common with Brahminical worship. But the policy which led to the clause proceeded upon the broad, easily-recognizable basis of allowing the newly-conquered people to retain their domestic usages.

And it is remarkable that an exactly similar precedent is to be found for the course adopted by the English Legislature at that very interesting period of history which was referred to in argument, though for a different purpose, by *Mr. Wallace*. When the northern nations successively overran the declining Roman Empire, and conflicts of laws were consequently arising every day with each new race of conquerors and those coming under their command, our rude Gothic ancestors had sufficient political wisdom to establish, as a fundamental principle, the same doctrine which is to be found in our English legislation. Marculfus, as cited by Von Savigny, 1 G. R. R. 127, has preserved a Charter of Justice which a Frank conqueror laid down for a provincial ruler, and which, in its broad comprehensive terms and intelligible principles, evinces that we have not learnt much in the language of legislation during the last twelve centuries. The Frank ordains as follows:—"*Et omnis populus ibidem commanentes, tam Franci, Romani, Burgundiones, quam reliquas (reliquæ?) nationes sub tuo regimine et gubernatione degant et moderentur, et eos recto tramite secundum legem et consuetudinem eorum regas.*"

I am clearly, therefore, of opinion, that the effect of the clause in the Charter is not to adopt the text of the Korán as law, any further than it has been adopted in the laws and usages of the Muhammadans who came under our sway: and if any class of Muhammadans, Muham-

madan dissenters as they may be called, are found to be in possession of any usage which is otherwise valid as a legal custom, and which does not conflict with any express law of the English Government, they are just as much entitled to the protection of this clause as the most orthodox *Sunníy* who can come before the Court. It may be observed, that express authority for this view is to be found in the decisions of the Company's Courts in Bengal in their expositions of the clause as to Gentoos; for those Courts have held, that where any custom has been clearly proved to exist, even in a single family, although at variance with the general Hindú law, such custom, if otherwise valid, is supportable. And in a case in this Presidency, in 2 Borr. 33, the text of the Korán in a case of inheritance was also set aside in favour of a different prevailing custom, on the ground that during the previous Brahman Government the Muhammadan law had fallen into disuse, and had given way to the custom of the country.

It should also be further observed, that these Muhammadan sectarians have lived chiefly in countries reigned over by Hindú princes; and I can have no doubts whatever on the evidence, and on what we know of the manner in which native Courts dispose of the controversies of their subjects, that if the present suit had been brought before the Rao of Cutch, or any of the Rajput Rájahs of Kattiwar, upon payment of the dues of office, the 25 per cent., or whatever the exaction might be, the decision would have been in conformity to that which is reverenced by all mankind, but by Hindús, perhaps, more than any other portion of mankind, ancient usage. If this be the true exposition of the rule which would be meted out to these people in their own country, it would be a monstrous thing that an English Court of Justice should be obliged to reverse such a time-honoured custom, and almost to revolutionize the internal economy of two whole Casts, out of some supposed obligatory force in a text called divine, which neither the Judge nor the parties to the suit believe in.

3. But there is another view in which the question may be placed, and although it was not taken during the argument, its extent is so much wider and more important than any of the principles above discussed, that I am desirous to make a few remarks upon it. It was

admitted on both sides at the Bar, that if the Memons and Kojahs could not support their custom as a valid Muhammadan custom, their successions must be governed either by the Korán, as if they were orthodox Mussulmáns, or by the law of England, as the *lex loci*. I think that this latter conclusion is erroneous, although I admit that some decisions, in former years, of this Court, and even an act of the Legislative Council relating to the Pársís, would seem to demand it. But as the opinion of the Privy Council will very likely be taken in this case, it seems desirable to call the attention of their lordships to this point.

The doctrine of *lex loci* seems to be one of altogether modern growth, and peculiar to Christendom. The early Roman law did not recognize it, but administered their own municipal regulations to Roman citizens, and appointed a *prætor peregrinus* for strangers. I have before alluded to the intermixture of the Gothic nations with the Romans, and it is easy to see from thence how the *lex loci* arose. At first each nation had its own personal laws preserved to it; but when Lombards, Visigoths, Franks, and Romans, became amalgamated into one mass, fighting in one field by each other's side, or struggling in the cities to achieve a common freedom, marrying and intermarrying in social life, and communicating at the same altar in religious rites, it is not wonderful that personal laws, among other national characteristics, should disappear, nor even that the laws of the conquering race should give way to the more comprehensive and refined code of their conquered subjects.

Thus was introduced, gradually, a common law, and at the same time a common language, into those countries. But the nations of Europe have such a family character from this similarity of race, institutions, and religion, that the municipal laws of any one Christian country are, without any violence, applicable to every Christian stranger who comes within its jurisdiction; and consequently the manifest advantages which the doctrine of *lex loci* presents has gained for it admission into the codes of modern Europe. But directly a Christian and non-Christian nation come in contact, the foundation of the doctrine of *lex loci* altogether disappears. LORD STOWELL, though without any local experience to guide him, observed this distinction with his usual profundity, and expressed it in a passage of more than ordinary beauty.

In the case of the Indian Chief he said: "Wherever a mere factory is founded in the eastern parts of the world, European persons trading under the shelter and protection of those establishments are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habit of the countries. In the western parts of the world alien merchants mix in the society of the natives, access and intermixture are permitted, and they become incorporated almost to the full extent. But in the East, from the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the natives; they continue strangers and sojourners as all their fathers were." *Doris amara suam non intermiscuit undam.* 3 Rob. Adm. R. 29.

By the comity of nations, therefore, as existing between princes of Christian and non-Christian faith, the *lex loci* to its whole extent is held not to apply to Europeans placing themselves under the Government of the latter. But if this is the case as regards Christian aliens in a foreign state, there can be no doubt that a similar comity requires a similar rule to be observed where a Musulmán or Hindú seeks a domicile in a Christian country. How far the peculiar laws of such non-Christian aliens would be recognized, it may not be very easy, nor is it necessary, to define beforehand. On each occasion it would afford matter for judicial discussion and determination when the question arose. But on very many questions, such as marriage, divorce, succession, and, possibly, adoption, there seems no reason to doubt that the proper law to be referred to for the decision of any controversy would not be the law of the Christian community, but the law and usage of the peculiar non-Christian class. That this was the opinion of the great Jurist whom I last cited is not left a matter of doubt, for he has stated it expressly in many of his judgments, with respect both to Jews and to that other singular oriental race the Gypsies. See 3 Rob. 32; *Ruding* v. *Smith*, 2 Hagg. Con. 384; *Lindo* v. *Belisario*, 1 Hagg. 216.

The case of the Jews in Europe is, indeed, a case completely in point as to the extent of the *lex loci* over a race not professing the Christian faith. Unfortunately, from the smallness of their numbers in England, we gain but little assistance from our law books as to the mode in which a British Court of Justice would dispose of their controversies, although, indeed, the principles laid down by LORD STOWELL, when carried to their legitimate consequences, seem sufficient for all practical purposes. But we have ample information as to other European countries; and Selden, in his Prolegomena to the Uxor Ebraica, tells us, that throughout Europe this race has always had their own law administered to them, in every case, "*ubi aut expressæ principum Christianorum sanctiones contrarium de eis non statuerint, aut mores adversi sanctionum vim sortiti, neutiquam involverint.*"

The conclusion I draw is, that if a custom otherwise valid is found to prevail amongst a race of eastern origin, and non-Christian faith, a British Court of Justice will give effect to it, if it does not conflict with any express Act of the Legislature; and as I have before shewn that the succession to an inheritance is one of those subject-matters in which the English Legislature has not thought it fit to speak by any general enactment, it follows that the particular custom of these Kojahs and Memon Cutchees, ought to be supported.

On all the above grounds I think that the attempt of these young women to disturb the course of succession which has prevailed among their ancestors for many hundred years has failed; and, as a price of an unsuccessful experiment, that their bills must be dismissed, with costs so far as the defendants seek to recover them.

NO. XXI.

RIGHT TO SIT ON GRAND JURIES.

6th June 1842.

THE jury lists in Bombay are made out once a-year, and the practice has been for the Sheriff and Clerk of the Crown to form the jurors into two lists of Grand and Petty Jurors respectively. As the labours of the Grand Jury are much the lighter of the two, and being placed on it is considered a social distinction, the applications are very frequent to the

Court to transfer parties from the Petty to the Grand Jury list. Several such applications having been made to MR. JUSTICE PERRY in chambers during the month of May in this year, his Lordship took time to consider, and in the June term delivered the following judgment:—

Several applications have been made to me in chambers to transfer the names of Petty Jurors to the Grand Jury list. The motives for these applications are very obvious; for, 1st, the duties of Grand Jurors are much less onerous than those of the Petty Jury; and 2dly, the being placed on the Grand Jury list is supposed (as is undoubtedly the case in England) to denote superior rank in society. The Court is very unwilling to listen to these applications, because, in point of fact, the efficient body of the public by whom service is rendered in the administration of criminal justice is the Petty and not the Grand Jury; and therefore I should be most reluctant to exercise any discretionary power by which the efficiency and respectability of the former should be diminished.

Another motive for the reluctance of the Court to interfere in these matters is, that it induces a personal inquiry into the rank and station of each applicant, a very difficult and touching subject to handle, especially in India. Still, as the question arises periodically, and can only be satisfactorily set at rest by laying down some general principle on the subject, I have taken pains to look carefully through the books as to what constitutes a claim—a legal claim—to be placed on the Grand Jury; and having discussed the matter at length with the Chief Justice, I will state the conclusion at which we have arrived on the subject, and will then examine the different claims before me, to see whether they come within the general principle laid down.

Strictly speaking, by the law of England there is no legal qualification or privilege entitling any one, however high in rank, to be placed on the Grand Jury by the 6th Geo. IV. c. 50., which consolidates the laws relative to juries in England: the qualification to serve on Grand or Petty Juries is absolutely the same. And it was held in *Sir Edward Baynton's case*, in Charles the Second's time, that a knight and member of parliament was liable to serve on Petty Juries, although, as Parliament was then sitting, he was excused. So also, by the Jury

Act applicable to this country, 7th Geo. IV. c. 37., and the rules of this Court made in pursuance of it, the English law is followed, and no distinction is made of the qualification required from Grand or Petty Jurors. It is true that an expression has crept into our rules referring to the "privilege, if any, to sit on Grand Juries;" but this is in some respects a faulty expression, for no such privilege exists in the English law. Although this Court has the power of defining, by rule, the classes on whom this privilege shall be conferred (as has been done at Calcutta), the Supreme Court of Bombay has omitted, and I think wisely, to do so, thus adopting the English law and practice.

I might therefore stop here, and, with the feeling of the Court which I have mentioned, as to the impolicy of encouraging these applications, decide that none of the claims before me present any title to be placed on the Grand Jury list, and that, as a matter of discretion, the Court declines to exercise it.

But as this in some degree would rest the decision on mere arbitrary principles, which, in cases of this kind, must occasionally be exercised by some one, and are by law vested in the Judges; and as, on looking through the Grand Jury list, it is impossible to help seeing that the present applicants are just as much entitled to be placed upon it as a very large proportion of those now returned as Grand Jurors; it is better to go a little deeper into the matter, and lay down some general rules, as well for the decision of the present cases, as for the future guidance of the Sheriff.

By the practice of England, which must be followed in this country as far as circumstances permit, the Sheriff must return on the panel of Grand Jurors "the principal inhabitants of the island." It is difficult to define exactly who are to be included in this description. SIR W. BLACKSTONE, 4 Com. 302, says, they must be "gentlemen of the best figure in the country." In the old Saxon times, in which the original of the institution is to be found, they were selected from the lower order of nobility—*seniores thani duodecim*, Thanes being, as is well known, a title of dignity sometimes superior to that of knight; and in English practice the county Grand Jury is always composed of individuals equal, from their territorial possessions and rank in society, to the lesser nobles of the old time. Now the Sheriff has undoubtedly

a difficult task to make up a Grand Jury panel from individuals such as these in the island of Bombay, because, in so exclusively a mercantile community as exists here, where all are engaged in the same pursuits, and where, from the levelling nature of commerce, every one who thrives in his particular calling is disposed (and justly so) to rate himself on an equality with the first of his class, he hardly has any clue to guide him. Wealth alone is not sufficient, for it may be coupled with anything but respectability, using "respectability" in the proper sense of the word, and not in that vulgar and immoral application of it which tends to confound it with the possession of mere riches. Neither are intelligence, birth, or the station of a gentleman *per se*, claims to enrolment on the Grand Jury; for although they do, for the public service in England, entitle the possessor of them to be placed on the Special Jury list, where a higher order of intelligence is required from Jurors, here, as they have no occason for such an institution, and have every motive to increase the respectability and intelligence of the Petty Jury, it must be well understood that the possession of the qualification I mention should not *per se* be considered a valid claim to the Grand Jury list. The rule of the Supreme Court at Calcutta, which, as I before mentioned, has defined who are to be placed on Grand Juries, though not applicable here, may be usefully read by the Sheriff in the performance of the duty I am alluding to. That rule entitles, amongst Europeans, 1st, civilians, 2dly, all persons entitled to the style of esquire, 3dly, all persons described in the Jury list as merchants or bankers; amongst natives, 1st, Rájahs, or persons of equivalent rank, 2dly, persons of such high Cast as could not sit on Common Juries; 3dly, all persons whose property amounts to Rs. 200,000, after paying their just debts; to be Grand or Special Jurors. If this rule were in force here I question whether a Grand Jury could be obtained at all; for as to Europeans, I observe there are only seven civilians returned on the Jury list; as to esquires, if a legal decision were called for on who are entitled to that style and addition the list would not probably furnish four names; and as to merchants and bankers, in the sense of the words as used in the city of London, the English mercantile community will know better than I how rigid and narrow is the meaning the great London merchants and bankers give to these terms. Then, as to the native gentry a still

smaller number would be obtained: of the first class, Rájahs, there are none; of the second class, none; and of the third class; the possessors of Rs. 200,000 after payment of debts, others will know much better than I how many are to be found.

It thus appears that, according to English law and practice, there is no class of individuals in this island of such easily defined and acknowledged rank as to furnish a Grand Jury; for of civilians there are unfortunately only seven; it also appears that there are probably not sufficient English merchants to furnish a whole panel; and of the high class of natives who are eligible in Calcutta absolutely none: and perhaps a conclusion might be drawn, that the institution of Grand Jury is wholly inapplicable to Bombay; a conclusion in which, considering the total inutility of such a body in India, I am quite disposed to concur. Still, as a Grand Jury is required by the law as it stands, and some rule must be adopted for its selection, the only conclusion I can come to is, that the High Sheriff, having heard what the law and practice of England is, as well as that of Calcutta, must exercise his best discretion as to who are principal inhabitants, observing the rules I have laid down; and with that discretion, I may add, the Court will be very unwilling to interfere.

I may also observe, that probably a good deal of difficulty would be avoided on this subject if the Jury list were returned in the English form, as one list, and that no such separate list should be made out as now exists for Grand Jurors. To each name the proper addition, as far as the Sheriff can ascertain, should be affixed, as is pointed out in the schedule to the English Jury Act. To an English merchant carrying on no retail business, the addition of merchant; to those entitled to that of esquire, that addition; and the like: they would then have to return, prior to each session, a panel of Grand Jurors, which he would select according to the best of his ability; and it should be well understood, that though being placed on that panel may be looked upon as denoting those who, from their rank or fortune, are considered the principal inhabitants of the island, the being summoned on a Petty Jury by no means shews that the party is not fully entitled to the title, which, after all, is the one we are each most anxious to possess,—I mean, that of gentleman.

The arrangement I thus allude to would get rid of this invidious distinction; one which ought not to exist between a Grand and Petty Jury list.

I now proceed to consider the different applications before me.

END OF SIR ERSKINE PERRY'S NOTES.

III.

PAPERS

ON THE

POLICE OF BOMBAY.

I. LETTER FROM THE CHIEF SECRETARY TO GOVERNMENT AND PRESIDENT OF THE POLICE COMMITTEE, WITH A REPORT ON THE POLICE OF BOMBAY. DATED THE 15TH NOVEMBER 1810.

II. LETTER FROM THE HON. SIR JAMES M'INTOSH, ON THE POLICE OF THE ISLAND OF BOMBAY, AND REPLY THERETO FROM THE SECRETARY TO GOVERNMENT. DATED THE 26TH OCTOBER 1811.

PAPERS

ON THE

POLICE OF BOMBAY.[1]

I. READ the following Letter from the Chief Secretary to Government and President of the Police Committee, with a Report on the Police of Bombay.

HONOURABLE SIR, *15th November* 1810.

1. The accompanying division of a general report on the Police of Bombay, compiled in pursuance of your orders dated the 20th October 1809, has been prepared many months back, though a few modifications have been recently introduced, but its transmission delayed in consequence of the attention of one of my colleagues having been unceasingly and unavoidably bestowed on other objects; and as I consider that Mr. Hungerford, from his removal from the office of Company's Solicitor, secedes from the Committee, and as Mr. Briscoe has informed me that he does not know when he shall be at leisure to officiate as a member of the Committee, I have, on these grounds, obtained the permission of the Honourable the Governor to lay the accompanying report before the Government.

2. In submitting a review of this nature to your consideration, I feel I shall meet that indulgence of which my inability to do full justice to a subject of such importance will stand so much in need. I have performed the important trust which your instructions vested in the Com-

[1] These Papers are edited from the unpublished MSS. kindly sent to me by the Honourable the Chief Justice of Bombay.

mittee to the best of my abilities, uninfluenced by any personal feelings or considerations whatever. I have endeavoured to point out the defectiveness of our Police system, and the remedies that occur to my humble judgment as practicable, and calculated to promote and to attain the ends for which the Committee was instituted.

3. Should the Honourable the Governor in Council determine to adopt the plan proposed, wholly or in part, or with the modifications that can no doubt be beneficially introduced by the experience and wisdom of the Government, I have only to say that I am prepared to lay before you the ways and means of realizing the funds whence the whole expense is to be defrayed. In this object the interests of the Company have been consulted. If the contribution to be made on the part of Government for the maintenance of this system of Police do not fall short of what they have heretofore annually disbursed, and thus prove an economical reform, those disbursements will not at least be exceeded, at the same time that the sum to be annually appropriated in future will be known and defined, and the Government not exposed, as at present, to unexpected calls on account of the country disbursements.

4. The very great change which this settlement has undergone since the institution of the office of Deputy of Police, the height to which its population and its prosperity have arisen, and the constant calls there exist for the administration of the law, render a reformation urgently necessary. By dividing the duties, a greater degree of efficiency will be introduced into the system. The active functions of the office being vested in a deputy, and the controul and influence and deliberative powers centered in a Superintendent General of Police, aided by the Magistrates, with whom, subject to the confirmation of the Governor in Council, the nomination to the subordinate stations in the establishment of the Deputy of Police should rest, appears to me to constitute a system best calculated to the circumstances of our situation. The *Mukaddams* of each Cast will also form part of the establishment of the Police, who will, through the aid he will derive from the vigilance of the Magistrates of Divisions and of the Deputy of Police, and the correspondence he will carry on with the Zillah Courts, be enabled to establish such a link of communication providing for the public se-

curity, as will, I should hope, place the Police on the most efficient basis.

5. Once a month a Bench, composed of the Superintendent of the Police and of the Magistrates of Divisions, should assemble, for the purpose of taking into consideration matters connected with the Police; and a Sessions of the Peace should invariably assemble quarterly, to deliberate and give effect to such propositions as may be submitted for the decision of that tribunal.

I have, &c.

(Signed) F. WARDEN,

Bombay Castle,
15th November 1810.

Chief Secretary and President of the Police Committee.

REPORT.

1. I proceed to offer my sentiments to the Committee on the instructions of Government directing a revision of the Police establishments. To carry those instructions into complete effect, more leisure and abstract attention are required, to digest the variety of important points they embrace, than we, or at least than I, have been enabled to command and to afford; but not to delay our report any longer, after the repeated indulgence we have experienced, I prefer laying before you an imperfect review, rather than protract the progress of these discussions.

2. I propose to enter into a review of the measures that have been adopted for the regulation of the Police since the promulgation of the Charter of 1753; comprehending the variety of changes that have occurred in the constitution of the Magistracy, the state of the markets, the prices of the necessaries of life, the rates of labour, the provisions made for watching and cleaning the streets of the town of Bombay, and the mode in which the charges have been defrayed; offering, under each division, such observations as may occur in respect to the principles on which the Police of the island should be in future regulated. In thus tracing the rise and progress of the Police, and the grounds of every municipal ordinance that has been enacted, in ascertaining their efficacy or otherwise, we shall profit by the errors or wisdom of our predecessors, and afford materials for the formation of a Police, on a basis which experience will have proved to be the most locally expedient.

3. I have prepared, and can lay before the Committee, or the Government, or His Majesty's Justices, if required, a summary of all the proceedings that are traceable on the records of Government, elucidatory of the objects of our inquiry, comprehending every presentment that has been made by Grand Juries since the year 1753. Upon those presentments have the several municipal enactments of this Government originated and been principally adopted. But as this review will be founded upon the data comprehended in that document, its production is unnecessary, though it may constitute a useful record for the Justices and Court of Sessions, as embracing the origin of our several Police establishments, and the several orders that have been passed, though lamentably neglected. In framing that compilation I have had to regret that the records of the Court of Sessions are not forthcoming for a period earlier than 1781: the loss of these has rendered the summary less accurate than it would have been, since the Government in former years abstracted itself from all interference in matters of Police, except as Justices of the Peace assembled in Quarter Sessions. The measures pursued to raise resources to meet the town and country charges for the years prior to 1781 are therefore lost to us: sufficient indications, however, exist to satisfy us of the nature of those proceedings which it is now my object to lay before you.

4. At the time that the Charter, dated the 8th of January 1753, was received, the Government of this Presidency was composed of a Governor and thirteen Counsellors, as fixed by the Honourable Court's Orders of the 30th of August and 7th of March 1749, all of whom were constituted Justices of the Peace and Commissioners of Oyer and Terminer and Jail Delivery, with like powers as Justices of Peace constituted by commission under the Great Seal of England: the Governor or President and Council, or any of them (whereof the Governor or President, or, in his absence, the senior of the Council then residing at Bombay, shall be one), were authorized to hold Quarter Sessions four times a-year, of Peace, Oyer and Terminer and Jail Delivery, and were also vested with powers for making bye-laws for the good government, and regulations of the several Corporations and Courts erected by that Charter, and of the inhabitants of the town limits and territories of Bombay.

5. An exemplification of that Charter was received at Bombay on the

17th of August 1753, with the Honourable Court's instructions on the subject. Amongst other benefits which this island derived from its provisions, the principal one, as far as affected the lower classes of the community, was the establishment of the Court of Requests.

6. On the 6th of January 1785 was received the Act of Parliament of the 24th Geo. III. c. 24., entitled an Act for the better regulation and management of the affairs of the East-India Company, and of the British possessions in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences in the East Indies, in consequence of which the administration of this Presidency was vested in a Governor and three Councillors, one military and two civil. This modification reducing, also, the number of Justices of the Peace, such additional ones as were requisite were nominated on an application from this to the Supreme Government, under a Commission issuing under the seal of the Supreme Court at Calcutta, pursuantly to the provisions of that Act.

7. The next alteration that was made in the Police of the island was founded on the Act of 1793, 33d Geo. III. c. 52., which was received on the 2d of December, entitled an Act for continuing in the East-India Company for a further term the possessions of the British territories in India, under certain limitations; for establishing further regulations for the government of the said territories, and the better administration of justice within the same; for appropriating to certain uses the revenues and profits of the said Company; and for making provision for the good order and government of the town.

8. After expounding the various clauses and provisions of the Act; and after defining the order of preference in which the clear profits arising out of the territorial acquisitions and revenues in India (after defraying the charges of collection) were to be appropriated; the Court observe, with respect to the provisions of the Act for the good order and government of the towns of Calcutta, Madras, and Bombay, that they had no particular directions to give, under a reliance that they would be effectual for remedying the inconveniences hitherto complained of; that the several other matters of Judicature and Police recommended from Bengal and Madras were under the consideration of His Majesty's ministers, and would receive due and imme-

diate attention; that for the guidance of the Government of Fort William a copy of the Commission of Peace, according to the forms in which it was usually issued in England, accompanied the Despatch to Bengal; and the Honourable Court directed that by the first Despatches after the issuing of every Commission of the Peace for the respective Presidencies, the Government furnish the Honourable Court with attested copies, in order that when occasions called for their production in England they might be ready for that purpose.

9. On the 6th of December the Governor in Council observed, that as, by the late Act of Parliament, the Governor-General in Council was authorized to nominate and appoint the Honourable Company's covenanted or other British inhabitants to act as Justices of the Peace for this Presidency and its subordinates, this Government, therefore, from its local knowledge, thought it necessary to communicate to the Governor-General in Council their sentiments respecting the number required for each settlement, and the gentlemen deemed best qualified for that office.

10. For the Presidency five were therefore recommended, exclusive of the members of Government, who were Justices *ex officiis*.

11. Two for Surat, one for Salsette, and five for the Province of Malabar.

12. In forwarding the warrant for the Commission of the Peace, under the Act of 1793, I find that the Supreme Government apprized the administration of this Presidency that a question arose, on preparing that document, whether the Legislature intended that the new Justices of the Peace for the Bengal provinces and for the Company's other Presidencies should hold Courts of Quarter Sessions by their own authority, for any purpose whatever; and that the Judges of the Supreme Court were of opinion that the Justices could not hold such Courts, even for the mere purpose of receiving an indictment or making assessments; but that they must be called upon by the present Justices of the Courts of Oyer and Terminer at the respective Presidencies, before they could sit on the trial of any indictment, or for the despatch of any business in Quarter Sessions; and that when so called upon they could only sit in conjunction with the present Justices, namely, as appears to me, the Governor and his Councillors.

13. The establishment of the Court of the Recorder on the 17th of

September 1798 superseded the powers of the Governor in Council as members of the Court of Oyer and Terminer and Jail Delivery, though those of Justices of the Peace authorized to hold Sessions of the Peace remained unimpaired. It is here not out of place to notice a paper of observations submitted by His Majesty's Justices in Sessions to the consideration of Government, containing questions which they were desirous to refer for legal advice, as to whether it be or be not legally expedient for the Governor and other members of Government to sit and officiate at the Court of Quarter Sessions. The subject was referred to Bengal on the 26th of April 1800, but no notice would appear to have been taken of it.

14. The principal object in view in agitating the question was to endeavour to reconcile what certainly appears to be a discordancy in the provisions of the Legislature; for though the Government is not amenable to the Court of the Recorder in its political character, yet their acts as Justices of the Peace, and Members of the Court of Quarter Sessions, would seem to be cognizable by that tribunal.

15. Nine Justices were named for the Island of Bombay, exclusive of the members of Government, on the establishment of the Court of the Recorder.

16. The powers of the Governor in Council to enact Police Regulations for the town of Bombay were defined and enlarged by the 47th Geo. III. c. 68.; the Act referring to the powers given to the Governor-General by the Act of the 13th Geo. III. c. 63. s. 36., and the Act of the 39th and 40th Geo. III. c. 79. s. 18. and 19., which powers were in future directed to be exercised for Bombay.

17. The Honourable Court's orders purported on this occasion that it was thought right to authorize the Governor in Council of Bombay to act as Justices of the Peace, in like manner as the Governor-General and Counsellors of Fort William are empowered by the 13th Geo. III. c. 38. to act in Bengal; and the power of appointing other persons to act as Justices of the Peace for Bombay, which, by the Act of the 33d Geo. III. c. 52. s. 151., is given to the Governor-General, is vested in this Government, to be exercised in the manner, and to be subject to the provisions, pointed out by that and the following sections of the same Act. This Act was received in Bombay on the 26th of February 1808.

18. Shortly after the receipt of the Act of the 47th Geo. III. c. 68. this Government nominated sixteen gentlemen to officiate, exclusive of the Governor in Council, as Justices of the Peace for Bombay alone, and they were duly sworn to discharge the duties of the office accordingly.

19. In proceeding now to advert to the powers exercised by His Majesty's Justices, I have to observe that the result of my researches has convinced my humble judgment that "very loose and mistaken notions of the true nature and extent of the Bench's jurisdiction have imperceptibly come to be entertained" generally, but particularly by the gentlemen at present in the Commission for the Peace; for we now find that His Majesty's Justices are contending for the exercise of authority equal to that of the Governor in Council, disputing the existence of any pre-eminence in those appointed by the Legislature over those who derive their birth from, and exist only during, the pleasure of the Government, without quoting the instances in which the Justices in former times, and those not very far back, scrupulously refrained from the exercise of acts over which they possessed no authority. I will here introduce a very applicable report by the late Advocate-General.

20. His Majesty's Justices of the Peace having taken into consideration the expediency of placing the servants, and, in particular, *Hammalls*, under some salutary controul, proceeded, under the acquiescence of the Government, to carry their intentions into effect. The proceedings having been referred to the Advocate-General, the following is an extract from Mr. Thriepland's report on the occasion:—

"With regard to the power possessed by His Majesty's Justices to frame rules and ordinances of the kind now before me, and thereafter to enforce their observance when duly published with the concurrence of the Honourable the Governor in Council, it is a branch of jurisdiction which I believe the Bench has been in use to exercise in this place, as well as on the other side of India; but I must candidly acknowledge, that, were there no precedent for the practice, I should find it a difficult matter to reconcile the exercise of such an authority with the nature of the office as understood in England; and I am ignorant of any Statute which confers powers on Justices in this country different from those which they enjoy at home."

"The case is very different with respect to the authority of the several Governments in India. In them the Legislature has thought fit, on various occasions, to repose a discretionary power of enacting rules and ordinances, not only for the regulation of the Courts and Corporations subject to their authority, but for the good government of the inhabitants residing under the respective Presidencies. And as the Governor and his Council were, till very lately, the only regular Justices in any part of India, I am apt to think some powers which belonged to them, and were exercised in the former capacity, have erroneously been deemed their right privilege in the latter; by which means very loose and mistaken notions of the true nature and extent of the Bench's jurisdiction have imperceptibly come to be entertained."

"The office of a Justice of the Peace, when accurately considered, is that of a conservator of laws already made, the breach of which would affect the peace of the public: but to enable either the individual or the body to frame new enactments, special powers are requisite, which none but the Legislature can confer. The same is true with regard to Governors and their Councils; but to them, as I have said, the necessary authority has been delegated: and when the Statute passed for that purpose, or the Charters founded upon them, are conformed to, the validity of the enactment cannot be called in question."

"The first of those Charters of which I shall take notice is that of the 26th Geo. II. A.D. 1753, when Mayors' Courts were established at the different settlements. By this grant the Governors and their Councils for the time being, besides being empowered to act as Justices of the Peace, are expressly authorized to make bye-laws and ordinances for the good order and government of the several Corporations and Courts, and of the inhabitants of the several towns, places, and factories, and to impose pains and penalties on all persons offending against the same; but it is specially provided that such ordinances are not to be put in execution, or to have any force or effect whatsoever, till approved and confirmed, by order in writing of the Court of Directors."

"In this state things continued till the year 1773, when a Supreme Court being about to be established at Calcutta, an Act was passed (13th Geo. III. c. 63.), which so far altered the former grant, that the

previous approbation of the Court of Directors was no longer a required preliminary to give effect and validity to the rules and ordinances of the Governor-General and Council; but the same were directed to be published and registered in the Supreme Court, from which period they were to have full force, and to continue valid, unless disapproved of within two years by His Majesty or his successors."

"If this Act had extended to the other Presidencies it would have removed much doubt as to the mode of rendering the rules and ordinances of either Governments effectual on occasions like the present; but regard being then had solely to the Supreme Court about to be established in Bengal, the subject was left on its former footing at both the other Settlements: and, which is very observable, even when a Supreme Court of Judicature was established at Madras by the 39th Geo. III. c. 79., no such publication and registry were directed as the 13th of the King, established in relation to Bengal."

"In this situation it is of use to remark in what manner the Government of Bombay has acted in passing rules and ordinances (which are perfectly distinct from the regulations of Government with respect to the County Courts) since the date of the last enactment above mentioned; and by the favour of the Honourable the Governor I have been furnished, among other precedents, with one which took place in the year 1780."

"Of that æra, when a number of rules of a nature extremely similar to those now proposed were found necessary for the better management of the police of the town and island of Bombay, they were first of all passed in Council by authority, as their preamble states, of the Royal Charter granted to the Honourable Company on the 8th of January in the 26th year of the reign of Geo. II. (1753.)"

"I have already mentioned the terms in which this Charter confers the power alluded to. Of these it is to be presumed the Governor and Council in 1780 were sufficiently aware; but being desirous, probably, to carry rules into immediate effect which were evidently of the first utility to the public, they seem to have thought that adhering to the subsequent Act, 13th Geo. III. c. 63. of 1773, as nearly as circumstances would admit, would sufficiently atone for and excuse their departure from that part of George the Second's Charter which was

VOL. II.] [PART VI.

AN

ANALYTICAL DIGEST

OF ALL

THE REPORTED CASES

DECIDED IN THE

SUPREME COURTS OF JUDICATURE IN INDIA,

IN THE

COURTS OF THE HON. EAST-INDIA COMPANY,

AND ON APPEAL FROM INDIA,

BY HER MAJESTY IN COUNCIL.

TOGETHER WITH AN INTRODUCTION,

NOTES, ILLUSTRATIVE AND EXPLANATORY, AND AN APPENDIX.

BY

WILLIAM H. MORLEY,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW,

MEMBER OF THE ROYAL ASIATIC SOCIETY, AND OF THE ASIATIC SOCIETY OF PARIS.

"IF IT BE ASKED HOW THE LAW SHALL BE ASCERTAINED WHEN PARTICULAR CASES ARE NOT COMPRISED UNDER ANY OF THE GENERAL RULES, THE ANSWER IS THIS: THAT WHICH WELL-INSTRUCTED BRAHMANS PROFOUND SHALL BE HELD INCONTESTABLE LAW."

MENU, B. xii. v. 108.

IN TWO VOLUMES.

VOL. II.

CONTAINING THE APPENDIX.

LONDON:

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"THE DOCTRINE OF THE LAW THEN IS THIS: THAT PRECEDENTS AND RULES MUST BE FOLLOWED, UNLESS FLATLY ABSURD AND UNJUST: FOR THOUGH THEIR REASON BE NOT OBVIOUS AT FIRST VIEW, YET WE OWE SUCH A DEFERENCE TO FORMER TIMES AS NOT TO SUPPOSE THAT THEY ACTED WHOLLY WITHOUT CONSIDERATION. UPON THE WHOLE, WE MAY TAKE IT AS A GENERAL RULE, 'THAT THE DECISIONS OF THE COURTS OF JUSTICE ARE THE EVIDENCE OF WHAT IS COMMON LAW.' IN THE SAME MANNER AS, IN THE CIVIL LAW, WHAT THE EMPEROR HAD ONCE DETERMINED WAS TO SERVE FOR A GUIDE FOR THE FUTURE."

Blackstone's Commentaries, Introd. Sec. 3.

Court to appoint guardians of infants, and of insane persons, and of their estates.

XXV. And we do hereby authorize and empower the said Supreme Court of Judicature, at Fort William in Bengal, to appoint guardians and keepers for infants, and their estates, according to the order and course observed in that part of Great Britain called England, and also guardians and keepers of the persons and estates of natural fools, and of such as are or shall be deprived of their understanding or reason, by the act of God, so as to be unable to govern themselves and their estates, which we hereby authorize and empower the said Supreme Court of Judicature, at Fort William in Bengal, to enquire, hear, and determine, by inspection of the person, or by such other ways and means by which the truth may best be discovered and known.

Supreme Court to be a Court of Admiralty.

XXVI. And it is our further will and pleasure, and we do hereby grant, ordain, establish, and appoint, that the said Supreme Court of Judicature, at Fort William in Bengal, shall be a Court of Admiralty, in and for the said provinces, countries, or districts, of Bengal, Bahar, and Orissa, and all other territories and islands adjacent thereunto, and which now are or ought to be dependent thereupon; and we do hereby commit and grant to the said Supreme Court of Judicature, at Fort William in Bengal, full power and authority to take cognizance of, hear, examine, try, and determine, all causes, civil and maritime, and all pleas of contracts, debts, exchanges, policies of assurance, accounts, charter-parties, agreements, loading of ships, and all matters and contracts, which in any manner whatsoever relate to freight or money due for ships hired and let out, transport-money, maritime usury or bottomry, or to extortions, trespasses, injuries, complaints, demands, and matters, civil and maritime, whatsoever, between merchants, owners, and proprietors of ships and vessels, employed or used within the jurisdiction aforesaid, or between others, contracted, done, had, or commenced, in, upon, or by the sea, or public rivers, or ports, creeks, harbours, and places overflown, within the ebbing and flowing of the sea, and high water mark, within, about, and throughout the said three provinces,

Their power, and in what causes to proceed.

Extent of jurisdiction, which is to be exercised as in England, without the strict formalities of law.

countries, or districts, of Bengal, Bahar, and Orissa, and all the said territories or islands adjacent thereunto, and dependent thereupon, the cognizance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in that part of Great Britain called England, together with all and singular their incidents, emergents, and dependencies, annexed and connexed causes whatsoever, and to proceed summarily therein, with all possible despatch, according to the course of our Admiralty of that part of Great Britain called England, without the strict formalities of law, considering only the truth of the fact, and the equity of the case.

Jurisdiction in regard to crimes maritime:

XXVII. And we do further commit to the said Supreme Court of Judicature, at Fort William in Bengal, full power and authority to inquire, hear, try, examine, and determine, by the oaths of honest and lawful men, being our British subjects, resident in the said town of Calcutta, and not otherwise[1], all treasons, murders, piracies, robberies, felonies, maimings, forestalling, extortions, trespasses, misdemeanors, offences, excesses, and enormities, and maritime crimes whatsoever, according to the laws and customs of the Admiralty, in that part of Great Britain called England, done, perpetrated, or committed upon the high seas, within the limits and jurisdiction aforesaid, and to fine, imprison, correct, punish, chastise, and reform parties guilty, and all violators of the law, usurpers, delinquents, contumacious absenters, masters of ships, mariners, rowers, fishers, shipwrights, and other workmen, exercising any kind of maritime affairs, according to the said civil[2] and maritime laws, ordinances, and customs, and their respective demerits, and to deliver and discharge persons imprisoned in that behalf, who ought to be delivered, and to take recognizances, obligations, stipulations, and cautions, as well to our use as at the instance of other parties, and to put the same in execution, or to cause or command them to be executed; and also to arrest, or cause or command to be arrested, according to the civil

to punish offenders, according to the civil and maritime laws,

and to deliver and discharge them.

May arrest ships, &c.

[1] Altered by the Jury Act, 7th Geo. IV. c. 37. and 2d and 3d Will. IV. c. 117.

[2] See 33d Geo. III. c. 52. s. 156. 53d Geo. III. c. 115. s. 110.

law, and the ancient customs of our High Court of Admiralty, in that part of Great Britain called England, all ships, persons, things, goods, wares, and merchandizes, for the premises and every of them, and for other causes whatsoever, concerning the same, wheresoever they shall be met with or found, in or throughout the said districts and jurisdictions aforesaid; and to compel all manner of persons in that behalf, as the case shall require, to appear and answer in the said Court, with power of using any temporal coercion, and inflicting mulcts and penalties, according to the laws and customs aforesaid; and moreover to compel witnesses, in case they should withdraw themselves for interest, fear, favour, or ill-will, or other cause whatsoever, to give evidence to the truth, in all and every the cause or causes above mentioned, according to the exigencies of the law, and to proceed in such cause or causes, according to the civil and maritime laws and customs, as well as of mere office, mixed or promoted, at the instance of any party, as the case may require, and to promulge and interpose all manner of sentences and decrees, and put the same in execution, according to the course and order of the Admiralty, as the same is now used in that part of Great Britain called England.

To compel persons to appear, under penalties.

Witnesses to answer according to the law civil and maritime, as is now used in England.

XXVIII. And we do hereby ordain and appoint, that all affidavits, taken in the said Supreme Court of Judicature, at Fort William in Bengal, or before any Justice thereof, shall be made on oaths administered in such form and manner as is before directed, in the case of witnesses to be examined before the said Supreme Court of Judicature, at Fort William in Bengal; and that in all civil cases, the affirmation in writing of a Quaker, which the said Court, or any Justice of the Supreme Court of Judicature, at Fort William in Bengal, as the case may require, are hereby authorized and empowered to take, shall be of the same weight, authority, and effect, as an affidavit upon oath: provided always that the several powers and authorities hereby to proceed in maritime causes, and according to the laws of the Admiralty, shall extend and be construed to extend only to the subjects of us, our heirs or successors, who

Affidavits and affirmations in the Court of Admiralty.

Jurisdiction to extend only to the king's subjects resident in Bengal, &c., and

not to servants of the Company, or of our subjects.

shall reside in the kingdoms or provinces of Bengal, Bahar, and Orissa, or some of them, and to persons who shall, when the cause of suit or complaint shall have arisen, have been employed by, or shall then have been, directly or indirectly, in the service of the United Company, or of any of our subjects.

Fines, &c., reserved to the King.

XXIX. And we do hereby reserve to ourselves, our heirs and successors, all amercements, fines, ransoms, and forfeitures, to be set and imposed by the said Supreme Court of Judicature, at Fort William in Bengal, or otherwise incurred: provided always, that it shall be lawful, and we hereby authorize and empower the said Supreme Court of Judicature, at Fort William in Bengal, to make such satisfaction to prosecutors of informations or indictments, as to the said Supreme Court of Judicature, at Fort William in Bengal, shall seem reasonable and fit, out of any fine to be by them set or imposed, upon any person or persons who shall be convicted on such prosecutions.

Satisfaction to be made to prosecutors out of fines set by the Court.

Appeal allowed to the King in Council, from the Supreme Court by petition to that Court.

XXX. And it is our further will and pleasure, and we do hereby direct, establish, and ordain, that if any person shall find him, her, or themselves aggrieved, by any judgment, decree, order, or rule of the said Supreme Court of Judicature, at Fort William in Bengal, in any case whatsoever, it may be lawful for him and them to appeal to us[1], our heirs or successors, in our or their privy council, in such manner, and under such restrictions and qualifications, as are hereinafter mentioned, that is to say, in all judgments, decrees, or decretal orders, made by the said Supreme Court of Judicature, at Fort William in Bengal, in any civil cause, the party and parties, against whom, or to whose immediate prejudice, the said judgment, decree, or decretal order, shall be or tend, may, by his or their humble petition, to be preferred for that purpose to the said Supreme Court of Judicature, at Fort William in Bengal, pray leave to appeal to us, our heirs

[1] For the law regulating such appeals, see 6th and 7th Vict. c. 38., 7th and 8th Vict. c. 69.

or successors, in our or their Privy Council, stating in such petition the cause or causes of appeal; and in case such leave to appeal be prayed by the party or parties, who is or are directed to pay any sum of money, or to perform any duty, the said Supreme Court of Judicature, at Fort William in Bengal, shall and is hereby empowered to award, that such judgment, decree, rule, or order, shall be carried into execution, or that sufficient security shall be given, for the performance of the said judgment, decree, rule, or order, as shall be most expedient to real and substantial justice: provided always, that where the said Supreme Court of Judicature, at Fort William in Bengal, shall think fit to order the judgment, decree, rule, or order, to be executed, security shall be taken from the other party or parties, for the due performance of such order or decree, as we, our heirs or successors, shall think fit to make thereupon; and in all cases, we will and require that security should also be given, to the satisfaction of the said Supreme Court of Judicature, at Fort William in Bengal, for the payment of all such costs as the said Supreme Court of Judicature, at Fort William in Bengal, may think likely to be incurred by the said appeal, and also for the performance of such judgment or order, as we, our heirs or successors, shall think fit to give or make thereupon; and upon such order or orders of the said Supreme Court of Judicature, at Fort William in Bengal, thereupon made, being performed to their satisfaction, the said Supreme Court of Judicature, at Fort William in Bengal, shall allow the appeal, and the party or parties, so thinking him, her, or themselves aggrieved, shall be at liberty to prefer and prosecute his, her, or their appeal to us, our heirs or successors, in our or their Privy Council, in such manner and form, and under such rules, as are observed in appeals made to us, from our plantations or colonies, or from our islands of Guernsey, Jersey, Sark, and Alderney.

In all cases security to be given for costs, and for performance of judgment, on appeal.

Supreme Court on such appeal to transmit a copy of all evidence, &c.

XXXI. And it is our further will and pleasure, and we do hereby direct and ordain, that, in all such cases, the said Supreme Court of Judicature, at Fort William in Bengal, shall certify and transmit, under the seal of the said Supreme Court of Judicature, at Fort William in Bengal, to us, or our heirs or successors, in our or their Privy Council,

a true and exact copy of all the evidence, proceedings, judgments, decrees, and orders, had or made in such causes appealed.

In criminal suits, the Court may allow or deny appeal, and regulate the terms.

XXXII. And it is our further will and pleasure, that in all indictments, informations, and criminal suits and causes whatsoever, the said Supreme Court of Judicature, at Fort William in Bengal, shall have the full and absolute power and authority to allow, or deny, the appeal of the party pretending to be aggrieved, and also to award, order, and regulate, the terms upon which such appeals shall be allowed in such cases, in which the said Supreme Court of Judicature, at Fort William in Bengal, may think fit to allow such appeal.

Reservation of power to the King to refuse an appeal, and to reform or alter judgment, &c.

XXXIII. And we hereby also reserve to ourself, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a judgment, or decree, or decretal, or other order or rule, of the said Supreme Court of Judicature, at Fort William in Bengal, to refuse or admit his, her, or their appeal therefrom, upon such terms, and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, correct, or vary such judgment, decree, or orders, as to us or them shall seem meet: and we do further direct and ordain, that the said Supreme Court of Judicature, at Fort William in Bengal, shall in all such cases conform and execute, or cause to be executed, such judgments and orders as we shall think fit to make in the premises, in such manner as any original judgment, decree, or decretal or other order or rule, by the said Supreme Court of Judicature, at Fort William in Bengal, should or might have been executed: provided always, that no appeal shall be allowed by the said Supreme Court of Judicature, at Fort William in Bengal, unless the petition for that purpose shall be preferred within six months from the day of pronouncing the judgment, decree, or decretal or other order complained of, and unless the value of the matter in dispute shall exceed the sum of one thousand Pagodas.[1]

Court to execute judgments and orders of His Majesty.

No appeals to be allowed, except the petition shall be preferred within six months, and unless the matter shall exceed 1000 Pagodas.

[1] But see 3d and 4th Will. IV. c. 41.; and Order in Council dated the 10th April 1838.

Governor-General and Council, Chief and other Justices, not to be arrested except for treason or felony.

XXXIV. Provided also, and we do hereby limit and declare, that the person or persons of the Governor-General, or of any of the Council, appointed in and by the above recited Act of Parliament, or of the Chief Justice, or any of the Justices, of the said Supreme Court of Judicature, at Fort William in Bengal, hereby erected and created, shall not, nor shall any of them respectively, be subject or liable to be arrested or imprisoned, upon any action, suit, or proceeding in the said Court, except in cases of treason or felony; nor shall the said Supreme Court of Judicature, at Fort William in Bengal, be competent to hear, try, and determine any indictment or information, against the said Governor-General, or any of the said Council, for the time being, for any offence, not being treason or felony, which the said Governor-General, or any of the said Council, shall or may be charged with having committed, in Bengal, Bahar, or Orissa, any thing hereinbefore contained to the contrary notwithstanding; but in all such cases above mentioned, wherein a Capias, or process, for arresting the body is hereby given and provided, it shall and may be lawful for the said Supreme Court of Judicature, at Fort William in Bengal, to order the goods and estate of such persons to be seized and sequestered, until he or they respectively shall appear, and yield obedience to the judgment, decree, decretal, or other order or rule of the said Court.

Their goods & estates may be seized and sequestered.

Court Room for holding Supreme Court to be appointed by Judges.

XXXV. And it is our further will and pleasure, and we do hereby direct, ordain, and appoint, that the said Chief Justice, and other Justices, shall respectively assemble themselves, in a proper court or room, to be by them appointed for that purpose, forthwith after their respective arrivals, at the said town of Calcutta in Bengal aforesaid; and before they shall proceed to execute the above-mentioned powers or authorities, or any of them, the said Chief Justice shall then and there take an oath, in the most solemn manner, that he will, to the best of his knowledge, skill, and judgment, duly and justly execute the office of Chief Justice of the said Supreme Court of Judicature, at Fort William in Bengal, and impartially administer justice in every cause, matter, or thing, which shall come before him, and also

Chief Justice to be sworn.

take the oath of allegiance and supremacy, and make and subscribe the declaration against transubstantiation, in such manner and form as the same are by law appointed to be taken or made in Great Britain, of which oaths a record shall be forthwith made: and we do hereby authorize the said Puisne Justices, or so many of them as shall be so assembled, to administer the said oaths and declarations, and make such record thereof accordingly; after which the said Puisne Justices, or so many of them as shall then and there be present, shall take the like oaths, and make and subscribe the like declarations, only changing what ought to be changed for that purpose, before the said Chief Justice, of which oaths also a record shall be forthwith made: and we do hereby authorize the said Chief Justice to administer the said oaths and declarations, and record the same accordingly; or if the said Chief Justice, or any other of the said Justices, shall be dead, or unavoidably absent, by sickness or otherwise, we do hereby authorize the next Justice of the said Supreme Court of Judicature, at Fort William in Bengal, who shall be there present, to take and administer the said oaths, and act, in all respects, as the Chief Justice should have done: and we do hereby further ordain and establish, that all and every succeeding Chief Justice and Puisne Justices, shall, before he or they be capable of exercising the said office, respectively take, in open Court, the like oaths, and make and subscribe the like declaration, only changing what ought to be changed for that purpose, whereof records shall be made, and filed among the other records of the Court from time to time; and after the said Chief Justice and Puisne Justices, or so many of them as shall then and there assemble, and be present, shall have taken the said oaths, and made and subscribed the like declaration, the said Supreme Court of Judicature, at Fort William in Bengal, shall be proclaimed and published in due manner, and proceed forthwith to the execution of the several authorities hereby vested in it.

Puisne Justices to be sworn.

All future Justices to be sworn before they can act.

Supreme Court to be proclaimed.

XXXVI. And it is our further will and pleasure, that from and after such publishing and proclaiming of the said Supreme Court of Judicature, at Fort William in Bengal, the said Mayor's Court of Calcutta at Fort Wil-

Former Charter of the 26th Geo. II. to be void after proclamation of

the Supreme Court.

liam in Bengal, aforesaid, granted, erected, and created, by and in the above-mentioned Charter, made in the twenty-sixth year of our said Royal Grandfather, and also the Court of Record, in nature of a Court of Oyer and Terminer, and Gaol Delivery, erected and created by the said authority thereby given to the President, or Governor or Council, of Fort William in Bengal, to be or act as Commissioners of Oyer and Terminer, and Gaol Delivery: and every clause and article in the said Charter which extends or relates to the establishment of the said Mayor's Court of Calcutta, at Fort William in Bengal, of the said Court of Oyer and Terminer, and Gaol Delivery, or to the civil, criminal, or ecclesiastical jurisdiction of the said Courts, or any of them, shall cease, determine, and be utterly void, to all intents and purposes whatsoever: provided always, that no judgment, decree, decretal, or other order, rule, or act of the said Mayor's Court of Calcutta, at Fort William in Bengal, or the said Court of Oyer and Terminer, and Gaol Delivery respectively, thereby legally pronounced, given, had or done, shall be hereby avoided, but shall remain in full force and virtue, as if these presents had not been made; nor shall any indictment, information, action, suit, cause, or proceeding, depending in the said Mayor's Court of Calcutta, at Fort William in Bengal, or in the said Courts of Oyer and Terminer, and Gaol Delivery, be abated or annihilated, but the same shall be transferred, in their then present condition, respectively to, and subsist and depend in the said Supreme Court of Judicature, at Fort William, to all intents and purposes, as if they had been respectively commenced in the last-mentioned Court: and we do hereby authorize and empower the said Supreme Court of Judicature, at Fort William in Bengal, to proceed accordingly in all such indictments, informations, actions, suits, causes, and proceedings, and to make such orders respecting the same, and also respecting any sum or sums of money belonging to the suitors at the said Mayor's Court of Calcutta, at Fort William in Bengal, as the said Mayor's Court of Calcutta, at Fort William in Bengal, or the said Court of Oyer and Terminer, and Gaol Delivery, might have made, or as the said Supreme

Proviso that no judgments, &c., pronounced by the Mayor's Court, &c., shall be thereby affected.

Proceedings depending in the Mayor's Court, &c., not to be abated, but transferred to the Supreme Court.

Court of Judicature, at Fort William in Bengal, is hereby empowered to make, in causes commenced or depending before the said Supreme Court of Judicature, at Fort William in Bengal; for which purpose it is our further will and pleasure, that all the records, muniments, and proceedings whatsoever, of or belonging to the said Mayor's Court of Calcutta, at Fort William in Bengal, or to the said Courts of Oyer and Terminer, and Gaol Delivery, shall be delivered over, deposited, and preserved among the records of the said Supreme Court of Judicature, at Fort William in Bengal.

Records of the Mayor's Court, &c., to be delivered over to the Supreme Court.

XXXVII. And we do hereby authorize and empower the said Supreme Court of Judicature, at Fort William in Bengal (respect being had to the seasons of the year, and the convenience of the suitors) to settle and appoint proper terms and law days, and days for sitting after term, and to proclaim, hold, and adjourn the Sessions of Oyer, Terminer, and Gaol Delivery, and Admiralty Sessions, as to them shall seem most expedient; provided nevertheless, that the said Supreme Court of Judicature, at Fort William in Bengal, shall, and they are hereby required to appoint not less than four terms in the year, each term consisting of four weeks at the least, in each year, and sittings after each term, each sitting to consist of fourteen days, if the business of the said Supreme Court of Judicature, at Fort William in Bengal, be not sooner despatched, and that the said Supreme Court of Judicature, at Fort William in Bengal, do in each year hold two Sessions of Oyer and Terminer, and Gaol Delivery.

Four Terms, and Sittings after Term, to be appointed in each year by the Supreme Court.

Duration of Terms and Sittings.

Two Sessions to be held every year.

XXXVIII. And we do hereby authorize and empower the said Supreme Court of Judicature, at Fort William in Bengal, to frame such rules of practice, and make such standing orders, for administration of justice, and the due exercise of the civil, criminal, admiralty, and ecclesiastical jurisdiction hereby created, and to do all such other things as shall be found necessary thereunto, so as the said Supreme Court of Judicature, at Fort William in Bengal, shall, from time to time, transmit the same, under the seal thereof, to us, our heirs or successors, in our

Court to frame Rules of practice, &c., and transmit them to the Privy Council for approval.

Privy Council, for our approbation, control, or alteration: and we do hereby reserve to us, our heirs and successors, with the advice of our or their Privy Council, full power and authority to approve, reject, control, or vary the same, and to make such new and other rules of practice, and rules and orders, for the process of the said Supreme Court of Judicature, at Fort William in Bengal, as to us or them shall appear fit and convenient, which we will and ordain shall be in force, from such time or times as the same shall be respectively transmitted to the said Supreme Court of Judicature, at Fort William in Bengal.

All Governors, King's officers, and subjects to be obedient to the Supreme Court.

XXXIX. And we do further hereby strictly charge and command all our governors, commanders, magistrates, officers, and ministers, civil and military, and all our faithful and liege subjects whatsoever, in and throughout the said provinces, countries, or districts of Bengal, Bahar, and Orissa, and all other lands, islands, or terrritories adjacent thereunto, and which are or ought to be dependent thereupon, that in the execution of the several powers, jurisdictions, and authorities hereby erected, created, and made, they be aiding, assisting, and obedient in all things, unto the said Supreme Court of Judicature, at Fort William in Bengal, as they will answer the contrary at their peril.

Dated the 26th March, 14th year of the reign.

XL. In witness whereof, we have caused these our letters to be made patent. Witness ourself, at Westminster, this twenty-sixth day of March, in the fourteenth year of our reign.

By writ of Privy Seal,

COCKS

II.

CHARTER

ESTABLISHING THE SUPREME COURT OF JUDICATURE AT MADRAS.

DATED THE 26TH DECEMBER 1800.

Recital of Charter, 8th January, 26th Geo. II., erecting the Mayor's Court at Madras.

I. GEORGE THE THIRD, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, To all to whom these presents shall come, greeting. Whereas our Royal Grandfather, King George the Second, of glorious memory, by his letters patent, under the great seal of Great Britain, bearing date at Westminster, the eighth of January, in the twenty-sixth year of his reign, did, for himself, his heirs and successors, amongst other things, give and grant unto the United Company of Merchants of England trading to the East Indies, and their successors; and did ordain, direct, establish, and appoint, that there should be thereafter, within the town or factory of Madraspatnam, on the coast of Coromandel in the East Indies, one body politic and corporate, by the name of the Mayor and Aldermen of Madraspatnam; and that such body politic and corporate should consist of a Mayor and nine Aldermen, to be respectively elected and appointed, in manner therein mentioned; and that the said body corporate, by the name aforesaid, should have perpetual succession. And our said Royal Grandfather did further grant, ordain, direct, and appoint, that the Mayor and Aldermen, for the time being, of Madraspatnam aforesaid, should, for ever thereafter be, and they were thereby constituted a Court of Record, by the name of the Mayor's Court of

Madraspatnam, with such powers, jurisdictions, and authorities, as in the said letters patent are mentioned. And by the same Charter it is ordained, that any person or persons thinking himself or themselves aggrieved by any judgment, sentence, or decree of the said Mayor's Court might appeal to the Governor, or President, and Council of Fort St. George for the time being, who, or any three, or more of them, were thereby, in the manner therein mentioned, appointed to be, for ever thereafter, a Court of Record for that purpose, to receive such appeals, and to hear and determine the same, and to do all other acts, matters, and things necessarily incident thereto, subject to such provisions, regulations, and restrictions as in the same Charter are contained. And by the said Charter, the Governor, or President and Council of Fort St. George for the time being, are appointed Justices of the Peace, and are, in the manner therein mentioned, authorized and appointed to hold Quarter Sessions of the Peace, and at all times thereafter to be a Court of Record, in the nature of a Court of Oyer and Terminer, and Gaol Delivery; and from time to time, and at all times thereafter, to be Commissioners of Oyer and Terminer, and Gaol Delivery, for the trying and punishing of such offenders and offences, and in such manner, as in the said Charter are and is mentioned. And by the same Charter or letters patent, our said late Royal Grandfather did establish another body politic and corporate, by the name of the Mayor and Aldermen of Calcutta, at Fort William in Bengal, and did direct and appoint, that the said Mayor and Aldermen of Calcutta should be a Court of Record, with such civil and criminal jurisdiction, within the town and factory of Calcutta, at Fort William in Bengal, or within any of the factories subject or subordinate thereto, as in the said Charter is mentioned.

Recital of the Act 37th Geo. III. c. 142.

II. And whereas, by an Act of Parliament passed in the thirty-seventh year of our reign, entitled "An Act for the better administration of justice at Calcutta, Madras, and Bombay, and for preventing British subjects from being concerned in loans to the Native Princes in India;" reciting, among other things, that the said Charter did not sufficiently provide for the due administration of justice, in such manner as the state and condition of the Company's Settlements at Madraspatnam required, it is amongst other things enacted, that it should be lawful for us, by Charter or letters

patent, under the great seal of Great Britain, to erect and establish a Court of Judicature at Madras, to consist of the Mayor and three of the Aldermen, resident at the said Setttlement of Madras, for the time being; which Aldermen were from time to time to be selected, in such manner as should be directed and prescribed by us in the said Charter, together with one other person, to be named from time to time by us, our heirs and successors, which person was to be a barrister of England or Ireland of not less than five years' standing, and which person, so appointed, was to be the President of the said Court, and was to be styled the Recorder of Madras: and that the said Court should have full power and authority to exercise and perform all civil, criminal, ecclesiastical, and admiralty jurisdiction, and to appoint such ministerial officers as might be necessary, and to form and establish such rules of practice, and such rules for the process of the said Court, and to do all such other things as should be necessary for the administration of justice, and the due execution of all or any of the powers which might, by the said Charter, be committed to the said Court; and that the same should also be, at all times, a Court of Oyer and Terminer, and Gaol Delivery, in and for Fort St. George and the town of Madras, and the limits thereof, and the factories subordinate thereto. And by the said Act divers provisions were made touching the extent of the said Charter, and the jurisdiction, powers, and authorities to be thereby established. And it is further (among other things) by the said Act enacted, That so much of the said Charter, granted by our said Royal Grandfather, as conferred any civil, criminal, or ecclesiastical jurisdiction upon the Mayor's Court of Madras, or upon the President and Council, as a Court of Appeal from the said Court, or of Oyer and Terminer, and Gaol Delivery of the said settlement, or the subordinates thereto belonging, in case a new Charter should be granted by us, in pursuance of the said Act, and should be openly published at Madras, from and immediately after such publication should cease and determine, and be absolutely void, to all intents and purposes, and all judicial powers and authorities, granted by any Act or Acts of Parliament to the said Mayor's Court, or Court of Appeal at the said settlement, should cease and determine, and be no longer exercised by the said Courts; but that the same should and might be exercised by the Court of Judicature, to

be erected by virtue of the said Act, in the manner and to the extent in the said Act before directed: but, nevertheless, the said Charter should, in all other respects, continue in full force and effect, to all intents and purposes, according to the true intent and meaning thereof (except in so far as it is altered or varied by the said Act) as fully and effectually as if the said Act had not been made, or such new Charter had not been granted.

Recital of the erection of the Recorder's Court at Madras.

III. And whereas, by our Letters Patent, under the great seal of Great Britain, bearing date at Westminster, the twentieth day of February, in the thirty-eighth year of our reign, passed in pursuance of the said recited Act of Parliament, we did, for us, our heirs and successors, grant, direct, ordain, and appoint, that there should be, within the settlement of Madras, a Court of Record, which should be called the Court of the Recorder of Madras; and we did thereby create, direct, and constitute the said Court of the Recorder of Madras to be a Court of Record, with such civil, criminal, and ecclesiastical jurisdiction, and with such powers and authorities, to be exercised in such manner as in the said letters patent is mentioned and directed. And whereas, the said letters patent have been openly published at Madras, and acted upon.

Recital of the Act 40th Geo. III. c. 79.

IV. And whereas, by an Act of Parliament passed in the fortieth year of our reign, entitled "An Act for establishing further regulations for the government of the British territories in India, and the better administration of justice within the same," reciting, among other things, the letters patent granted by our said late Royal Grandfather, bearing date the eighth day of January, in the twenty-first year of his reign, and first hereinbefore recited; and reciting, that the said Charter, so far as respected the administration of justice at Madras, had been altered and changed, by virtue of the said recited Act, passed in the thirty-seventh year of our reign; and that the said Charter, so far as it respected the administration of justice at Fort William in Bengal, had also been altered and changed, by virtue of an Act passed in the thirteenth year of our reign, intitled, "An Act for establishing certain Regulations, for the better management of the affairs of the East-India Company, as well in India

as in Europe," and by divers subsequent Statutes; and reciting, that it might be expedient, for the better administration of justice in the said settlement of Madras, that a Supreme Court of Judicature should be established at Madras, in the same form, and with the same powers and authorities, as that now subsisting, by virtue of the several Acts beforementioned, at Fort William in Bengal: It is enacted, that it should and might be lawful for us, our heirs and successors, by Charter, or letters patent, under the great seal of Great Britain, to erect and establish a Supreme Court of Judicature at Madras aforesaid, to consist of such and the like number of persons, to be named, from time to time, by us, our heirs and successors, with full power to exercise such civil, criminal, admiralty, and ecclesiastical jurisdictions, both as to natives and British subjects, and to be invested with such power and authorities, privileges, and immunities, for the better administration of the same, and subject to the same limitations, restrictions, and controul, within the said Fort St. George, and town of Madras, and the limits thereof, and the factories subordinate thereto, and within the territories which then were, or thereafter might be, subject to, or dependent upon, the said Government of Madras, as the said Supreme Court of Judicature, at Fort William in Bengal, by virtue of any law then in force and unrepealed, or by the Act now in recital, doth consist of, is invested with, or subject to, within the said Fort William, or the kingdoms and provinces of Bengal, Bahar, and Orissa. And it is, by the Act now in recital, provided, that the Governor and Council of Madras, and the Governor-General of Fort William aforesaid, should enjoy the same exemption, and no other, from the authority of the said Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor-General and Council at Fort William aforesaid, from the jurisdiction of the Supreme Court of Judicature there, already by law established. And it is by the same Act further enacted, That if we, our heirs or successors, should grant such Charter as aforesaid, and erect such Supreme Court of Judicature at Madras as aforesaid, all the records, muniments, and proceedings whatsoever, of and belonging to the late Mayor's Court at Madras, or to the late Court of Oyer and Terminer, and Gaol Delivery, which were, by the said Act passed in the thirty-seventh year of our reign, directed to be delivered over, preserved, and

deposited in the new Courts, erected by virtue of the said Act, and all the records, muniments, and proceedings, whatsoever, of and belonging to any of the said new Courts, should, from and immediately after such Supreme Court of Judicature, as we are thereby empowered to erect, should be established at Madras, be delivered over to be preserved and deposited for safe custody, in the said Court of Judicature, to which all parties concerned should and might have resort and recourse, upon application to the said Court. And it is by the same Act further enacted, that so much of the said Charter granted by us for erecting the Court of the Recorder of Madras, as relates to the appointment of such Recorder, and the erecting of such Courts of Judicature at Madras, in case a new Charter should be granted by us, our heirs or successors, and should be openly published at Madras, from and immediately after such publication, should cease and determine, and be absolutely void, to all intents and purposes whatsoever; and all powers and authorities granted by the said Act of the thirty-seventh year of our reign to the said Court of the Recorder of Madras, should cease and determine, and be no longer exercised by the said Court; but the same should and might be exercised by the Supreme Court of Judicature, to be erected by virtue of the Act now in recital, in the manner, and to the extent thereinbefore directed. And that when the said Supreme Court of Judicature, which we are by the said Act now in recital empowered to erect, should be erected, the Court of Directors of the said United Company should, and they are thereby required to direct and cause to be paid, certain and established salaries to the Chief Justice, and each of the Judges of such Supreme Court of Judicature at Madras, as should be by the said new Charter established, that is to say, to the Chief Justice, six thousand pounds by the year; and to each of the Judges of the said Supreme Court of Judicature at Madras, five thousand pounds by the year. And that such salaries should be paid and payable to each and every of them, respectively, out of the territorial revenues of the said settlement of Madras, at an exchange of eight shillings for the pagoda of that settlement, and should commence and take place, in respect of such person or persons who should be resident in Great Britain at the time of their appointment, upon and

from the day on which such person should embark from Great Britain; and that the salaries of all such persons who should, at the time of their appointment, be resident in India, should commence and take place from and after their respectively taking upon them the execution of their office, as aforesaid; and that all such salaries should be in lieu of all fees of office, perquisites, emoluments, and advantages, whatsoever; and that no fees of office, perquisites, emoluments, or advantages, whatsoever, should be received or taken, in any manner, or on any account or pretence whatsoever, other than such salaries and allowances as are in and by the Act now in recital directed to be paid, as by the said Act may more plainly and at large appear.

Establishment of a Court of Record, to be called the Supreme Court of Judicature at Madras.

V. Now know ye, that we, upon full consideration of the premises, and of our especial grace, certain knowledge, and mere motion, have thought fit to grant, direct, ordain, and appoint, and by these presents we do accordingly, for us, our heirs and successors, grant, direct, ordain, and appoint, that there shall be, within the settlement of Fort St. George, a Court of Record, which shall be called the Supreme Court of Judicature at Madras, we do hereby create, direct, and constitute the said Supreme Court of Judicature at Madras to be a Court of Record.

To consist of a Chief Justice and two Puisne Justices.

VI. And we do further will, ordain, and appoint, that the said Supreme Court of Judicature at Madras shall consist of, and be holden by and before, one principal Judge, who shall be and be called the Chief Justice of the Supreme Court of Judicature at Madras, and two other Judges, who shall be and be called the Puisne Justices of the Supreme Court of Judicature at Madras; which Chief Justice and Puisne Justices shall be barristers, in England or Ireland, of not less than five years' standing, to be named and appointed from time to time by us, our heirs and successors, by letters patent, under our and their great seal of Great Britain, whilst such seal shall be used, and afterwards under our and their great seal of the United Kingdom of Great Britain and Ireland: and such Chief Justice and Puisne Justices, and all and every of them, shall hold their said offices, severally and respectively, during the pleasure of us, our heirs and successors, and not otherwise.

Their qualification and mode of appointment.

Their rank.

VII. And we do hereby give and grant to our said Chief Justice rank and precedence above and before all our subjects whomsoever, within the territories subject to the government of Fort St. George aforesaid, excepting the Governor-General for the time being of the Presidency of Fort William in Bengal, and the Governor of Fort St. George for the time being; and excepting all such persons as by law and usage take place in England before our Chief Justice of our Court of King's Bench: and we do hereby also give and grant to each of our said Puisne Justices respectively, according to their respective priority of nomination, rank and precedence above and before all our subjects whomsoever, within the territories subject to the government of Fort St. George, excepting the said Governor-General for the time being of the Presidency of Fort William in Bengal, and the Governor of Fort St. George for the time being; and excepting our said Chief Justice of our said Supreme Court of Judicature at Madras, and all and every the member and members of the Council there; and also excepting all such persons as by law and usage take place in England before our Justices of the Court of King's Bench.

The Court invested with a jurisdiction similar to the jurisdiction of the King's Bench in England.

VIII. And it is our further will and pleasure, that the said Chief Justice, and the said Puisne Justices, shall, severally and respectively, be, and they are all and every of them hereby appointed to be, Justices and Conservators of the Peace, and Coroners, within and throughout the Settlement of Fort St. George, and the town of Madras, and the limits thereof, and the factories subordinate thereto, and all the territories which now are, or hereafter may be, subject to, or dependent upon, the Government of Madras aforesaid; and to have such jurisdiction and authority as our Justices of our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain called England, as far as circumstances will admit.

All acts of the Court to be decided by the majority of the Judges present, with a

IX. And we do further will and ordain, that all judgments, rules, orders, and acts of authority or power whatsoever, to be made or done by the said Supreme Court of Judicature at Madras, shall be made or done with and by the concurrence of the said three Judges, or so many

casting voice to the President.

or such one of them as shall be, on such occasions, respectively, assembled or sitting as a Court, or of the major part of them so assembled and sitting. Provided always, that in case there shall be only two of such Justices present, and they shall be divided in their opinions, the Chief Justice, if present, shall have a double or casting voice; and if the Chief Justice shall be absent, the matter shall abide the future judgment of the Court.

The Court is to have a seal, bearing His Majesty's arms, which is to be kept by the Chief Justice, or by the Senior.

X. And we do further grant, ordain, and appoint, that the said Supreme Court of Judicature at Madras shall have and use, as occasion may require, a seal, bearing a device and impression of our royal arms, within an exergue, or label, surrounding the same, with this inscription, "The seal of the Supreme Court at Madras." And we do hereby grant, ordain, and appoint, that the said seal shall be delivered to, and kept in the custody of, the said Chief Justice; and in case of vacancy of the Office of Chief Justice, the same shall be delivered over to, and kept in the custody of, such person who shall then be senior Puisne Judge, during such vacancy. And we do hereby grant, ordain, and appoint, that if it shall happen that the said seal shall by any means come to the hands of any person or persons, other than the Chief Justice, or such person as, for the time being, is hereby authorized to have the custody thereof, the said Supreme Court of Judicature at Madras shall be, and is hereby authorized and empowered to demand, seize, and take the said seal, from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession, other than the person, for the time being, hereby authorized and required to have the custody thereof; and shall forthwith deliver such seal to the said Chief Justice, or to such other person as shall be, for the time being, authorized by these presents to have the custody of such seal, as aforesaid.

All writs are to be issued, under the seal, in the name of the King.

XI. And we do hereby further grant, ordain, and appoint, that all writs, summonses, precepts, rules, orders, and other mandatory process, to be used, issued, or awarded by the said Supreme Court of Judicature at Madras, shall run and be in the name and style of us, or of our heirs and successors, and shall be sealed with the seal of the said Supreme Court of Judi-

cature at Madras, and shall have and bear the attestation of the Chief Justice, or in the vacancy of the said office, of the senior of the two Puisne Justices, and shall be signed by the proper officer, whose duty it shall be to prepare and make out the same respectively.

Salaries to the Chief Justice, and other Justices, in lieu of perquisites.

XII. And we do further grant, ordain, appoint, and declare, that the said Chief Justice, and the said Puisne Justices, so long as they shall hold their offices, respectively, shall be entitled to have and receive, respectively, the salaries in and by the said recited Act of Parliament provided for that purpose; that is to say, the Chief Justice six thousand pounds by the year, and the two Puisne Judges five thousand pounds by the year, each of them, such salaries to commence and be paid, and payable at such time and at such exchange, and in such manner and form, as in the said Act of the fortieth year of our reign is specified and directed.[1]

XIII. And we do hereby ordain, appoint, and declare, that the said salaries shall be in lieu of all fees of office, perquisites, emoluments, and advantages, whatsoever; and that no fees of office, perquisites, emoluments, and advantages, whatsoever, other than and except the said salaries, shall be accepted, received, or taken by such Chief Justice, or the Puisne Justices, in any manner, or on any account or pretence whatsoever.

And the Judges prohibited from engaging in any other office or employment, on pain of forfeiture.

And we do further grant, appoint, and declare, that no Chief Justice, or other Justice of the said Supreme Court of Judicature at Madras, during the time of holding and exercising the said offices, respectively, shall be capable of accepting, taking, or performing, any other office, place, or employment, of any denomination whatsoever, on pain that the acceptance of any such other office, place, or employment, shall be and be deemed in law, *de facto*, an avoidance of his office of Chief Justice, or one of the Puisne Justices of the said Supreme Court of Judicature, as the case may be; and the salary thereof shall cease, and be deemed to have ceased accordingly, from the time of such acceptance of any other office, place, or employment. Nevertheless, in case of one of the Justices of the said Supreme

[1] By the 39th and 40th Geo. III. c. 79. s. 9. the salaries of the Judges cease on their leaving India. The 6th Geo. IV. c. 85. regulates the payment of the Judges' salaries and pensions.

Court of Judicature at Madras acting as Recorder of Bombay, during a vacancy of such office of Recorder of Bombay, in pursuance of the provision in the said recited Act of the fortieth year of our reign for that purpose contained, or in case all or any of the Justices of the said Supreme Court shall be nominated or appointed by us, our heirs or successors, Commissioners for the trial and adjudication of prize causes, and other maritime questions, arising in India, we ordain and declare that his or their appointment, as such Justice or Justices of such Supreme Court of Judicature at Madras, shall not be vacated, nor shall his or their right to his or their salary, as such Justice or Justices of the said Supreme Court, be affected, by reason of his exercising the office of Recorder of Bombay, or by reason of his or their acting under any such Commission as aforesaid, nor shall he or they thereby be disabled from accepting the office of Chief Justice of the said Supreme Court of Judicature at Madras.

XIV. And we do hereby constitute and appoint our trusty and well-beloved Sir Thomas Andrew Strange, Knight, to be the first Chief Justice, and our trusty and well-beloved Henry Gwillim and Benjamin Sullivan, Esquires, to be the first Puisne Justices of our said Supreme Court of Judicature at Madras, the said Sir Thomas Andrew Strange and Henry Gwillim, being barristers in England, of five years' standing and upwards, and the said Benjamin Sullivan being a barrister in Ireland, of five years' standing and upwards.

Provision as to Sheriff.

XV. And we do further, for us, our heirs and successors, grant, ordain, and appoint, that the person who shall be the Sheriff at Fort St. George, or Madraspatnam, at the time of the publication of this our Charter at the Presidency of Fort St. George, shall be and continue the Sheriff, until another shall be duly appointed and sworn into the said office. And we do further, for us, our heirs and successors, grant, direct, and appoint, that the Governor or President and Council of Fort St. George aforesaid, for the time being, or the major part of them (whereof the said Governor or President, or in his absence, the Senior of the Council then residing at Fort St. George aforesaid to be one) shall yearly, on the first Tuesday in December, or as soon after as may be, assemble themselves, and proceed to the appointment of a new Sheriff for the year ensuing, to be computed from

the twentieth day of December next after such appointment; which Sheriff when appointed, shall, as soon as conveniently may be, and before he shall enter upon his said office, take an oath faithfully to execute his office, and the oath of allegiance, before the Governor, or in his absence the senior member of the Council there present (who are hereby respectively authorized to administer the same), and shall continue in such office during the space of one whole year, to be computed from the said twentieth day of December, and until another shall be duly appointed and sworn into the said office. And in case such Sheriff shall die in his office, or depart from the coast of Coromandel, then another person shall and may, as soon as conveniently may be after the death or departure of such Sheriff, be in like manner appointed and sworn in as aforesaid, and shall continue in his office for the remainder of the year, and until another Sheriff shall be duly appointed and sworn into the said office. And we do further order, direct, and appoint, that the said Sheriff and his successors shall, by themselves or their sufficient deputies, to be by them appointed and duly authorized under their respective hands and seals, and for whom he and they shall be responsible during his or their continuance in such office, execute, and the said Sheriff and his said deputies are hereby authorized to execute, all the writs, summonses, rules, orders, warrants, commands, and process of the said Supreme Court of Judicature at Madras, and make return of the same, together with the manner of the execution thereof, to the said Supreme Court of Judicature at Madras, and to receive and detain in prison all such persons as shall be committed to the custody of such Sheriff, by the said Supreme Court of Judicature at Madras, or by the Chief Justice, or any of the said Puisne Justices of the said Court, respectively.

The Sheriff's duty defined.

And the Court is empowered to cause Writs, &c. to be directed to any other person for execution, where the Sheriff is interested.

XVI. And we do further direct, ordain, and appoint, that whenever the said Supreme Court of Judicature at Madras shall direct or award any process against the said Sheriff, or award any process in any cause, matter, or thing, wherein the said Sheriff, on account of his being related to the parties, or any of them, or by reason of any good cause of challenge, which would be allowed against any Sheriff in that part of Great Britain called England,

cannot or ought not by law to execute the same, in every such case the said Supreme Court of Judicature at Madras shall name and appoint some other fit person to execute and return the same; and the said process shall be directed to the said person so to be named for that purpose, and the cause of such special proceedings shall be suggested and entered on the records of the said Court.

Court to fix limits, beyond which the Sheriff is not bound to execute process, and provision to execute process beyond such limits.

XVII. Provided always, and we do hereby ordain and declare, that the said Supreme Court of Judicature at Madras shall fix certain limits, beyond which the said Sheriff shall not be compelled or compellable to go in person, or by his officers or deputies, for the execution of any process of the said Court: and upon occasions where the process of the said Court shall be to be executed in any place or places beyond the said limits so to be fixed, we grant, ordain, and direct, that the Chief Justice, or one of the said Puisne Justices, shall, by order, subject to the revision and controul of the said Court, or the said Court shall, upon motion, direct by what person or persons, and in what manner, such process shall be executed, and the terms and conditions which the party issuing the same shall enter into, in order to prevent any improper use or abuse of the process of the Court. And the said Sheriff shall, and he is hereby required to grant his special warrant or deputation to such person or persons, as the said Chief Justice, or one of the Puisne Justices, or the said Court, may direct, for the execution of such process. And in that case we direct and declare; that the said Sheriff, his executors or administrators, shall not be responsible or liable for any act to be done, in or in any ways respecting the execution of such process, under and by virtue of such special warrant: and any person or persons, being aggrieved under or by pretence of such special warrant, shall and may seek their remedy, under any security which may have been directed to be taken upon the occasion, and which the said Court, or the said Chief Justice, or Puisne Justices, are hereby authorized to direct to be taken.

Court to admit Advocates and Attorneys.

XVII. And we do hereby further authorize and empower the said Supreme Court of Judicature at Madras to approve, admit, and enrol such, and so many persons, being *bonâ fide* practitioners of the law in the said Court of the Recorder at

Madras, at the time of the publication of this our Charter at Madras, or having been admitted Barristers-at-Law in England or Ireland,[1] or having been admitted Attorneys or Solicitors in one of our Courts at Westminster, or being otherwise capable, according to such rules and qualifications as the said Court shall for that purpose make and declare, to act, as well in the character of Advocates as of Attornies in the said Court; and which persons, so approved, admitted, and enrolled, as aforesaid, shall be, and are hereby authorized to appear and plead, and act for the suitors of the said Court; subject always to be removed by the said Court from their station therein, upon reasonable cause. And we do declare, that no other person or persons whatsoever shall be allowed to appear and plead or act in the said Supreme Court of Judicature at Madras, for and on the behalf of such suitors, or any of them. Provided always, and we do hereby further ordain and declare, that no person, from and after the date of these our letters patent, other than the said persons, being *bonâ fide* practitioners of the law in the said Court of the Recorder of Madras, at the time of the publication of this our Charter, shall be capable of being admitted or enrolled, or of practising in the said Court, without the license of the said United Company, for that purpose first had and obtained.[2]

Appointment of clerks and other officers.

XIX. And we do further authorize and empower the said Supreme Court of Judicature at Madras, from time to time, as occasion shall require, to appoint so many and such Clerks, Registers, Proctors, and other Ministerial Officers, as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities which are and shall be granted and committed to the said Court, by these our letters patent.

Fees to be settled by the Court, subject to the revision of the Governor of Fort St.

XX. And we do hereby further authorize and empower the said Supreme Court of Judicature at Madras to settle a table of the fees to be allowed to such Sheriff, Attorneys, and all other the Clerks and other Officers aforesaid, for all and every part of the business to be done by them,

[1] By the 3d & 4th Will. IV. c. 85. s. 115. the being entitled to practise as an advocate in the principal Courts of Scotland is a qualification for admission as an advocate for any Court in India.

[2] By the 3d & 4th Will. IV. c. 85. s. 115. the Company's license is unnecessary.

George in Council.

respectively, which fees, when approved by the said Governor of Fort St. George, in Council (to whom we hereby give authority to review the same,) the said Sheriff, Attornies, Clerks and other Officers, shall and may lawfully demand and receive. And we do further authorize the said Supreme Court of Judicature at Madras, with the like concurrence of the said Governor in Council, from time to time, to vary the said table of fees, as there shall be occasion. And it is our further will and pleasure, and we do hereby require and enjoin the said Court, within one year after these our letters patent shall have been published at Madras aforesaid, and within one month from the said settling and allowance of the said table of fees, to certify, under their several hands and seals, and to transmit to the President of the Board of Commissioners for the affairs of India, to be laid before us, our heirs and successors, for our and their Royal approbation and correction, a true copy of the said table of fees, together with the approbation of the said Governor in Council, and also any variation of the said table, to be made as aforesaid, within one month after the same shall have been so varied. And we further direct and appoint, that the said table, and the said alteration and variations thereof (if any alteration or variation shall be made) shall be hung up in some conspicuous part of the hall, or place, where the said Supreme Court of Judicature at Madras shall be publicly holden.

A true copy of the table of fees to be transmitted to the President of the Board of Commissioners for the affairs of India, to be laid before the King for his approbation and correction.

The jurisdiction of the Court defined:

XXI. And we do further direct, ordain, and appoint, that the jurisdiction, powers, and authorities of the said Supreme Court of Judicature at Madras,[1] shall extend to all such persons as have been heretofore described and distinguished in our Charters of Justice for Madras by the appellation of British subjects, who shall reside within any of the factories, subject to, or dependent upon, the Government of Madras; and that the said Court shall be competent and effectual, and shall have full power and authority to hear and determine all suits and actions whatsoever against any of our said

[1] By the 4th Geo. IV. c. 71. s. 17. the Supreme Courts at Madras and Bombay have granted to them the same powers as the Supreme Court at Fort William in Bengal.

subjects, arising in territories subject to, or dependent upon, or which hereafter shall be subject to, or dependent upon, the said Government, or within any of the dominions of the native princes of India in alliance with the said Government, or against any person or persons who at the time when the cause of action shall have arisen, shall have been employed by, or shall have been directly or indirectly in the service of the said United Company, or any of the said subjects of us, our heirs or successors. And the said Court hereby established shall have like power and authority to hear, try, and determine all, and all manner of civil suits and actions which, by the authority of any Act or Acts of Parliament might have been heard, tried, or determined by the said Mayor's Court at Madras aforesaid, or which may now be heard, tried, or determined by the said Court of the Recorder of Madras; and all powers, authorities, and jurisdictions, of what kind or nature soever, which by any Act or Acts of Parliament may be, or are directed to be exercised by the said Mayor's Court, or by the said Court of the Recorder of Madras, shall and may be as fully and effectually exercised by the said Supreme Court of Judicature at Madras, as the same might have been exercised and enjoyed by the said Mayor's Court, or by the said Court of the Recorder at Madras.

As to the inhabitants of Madras.

XXII. And we do hereby further direct and ordain, that the said Supreme Court of Judicature at Madras shall have full power to hear and determine all suits and actions that may be brought against the inhabitants of Madras. Yet nevertheless, in the cases of Mahomedans or Gentoos, their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing, between party and party, shall be determined, in the case of the Mahomedans, by the laws and usages of the Mahomedans; and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined by, if the suit had been brought, and the action commenced, in a Native Court; and where one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant. And in all suits so to be determined by the laws and usages of the said natives, the said Courts shall make such rules and orders for the conduct of the same, and frame such process for the execution of their judgments, sentences, or decrees, as

shall be most consonant to the religion and manners of the said natives and to the said laws and usages respectively, and the easy attainment of the ends of justice. And in all cases such means shall be adopted for compelling the appearance of witnesses, and taking their examination, as shall be consistent with the said laws and usages, so that all suits may be conducted with as much ease, and at as little expense, as shall be consistent with the attainment of substantial justice.

Certain persons not to be arrested.

XXIII. Provided always, and we do hereby declare, that nothing in this Charter shall extend, or be construed to extend, to subject the person of the Governor-General of Fort William, or the person of the Governor, or any of the Council at the said settlement of Madras, or the person of the Chief Justice, or any of the Justices respectively for the time being, to be arrested or imprisoned in any suit, action, or proceeding in the said Court; nor shall it be competent for the said Court to hear or determine, or to entertain or exercise jurisdiction in any suit or action against the Governor-General of Fort William, or the Governor, or any of the Council of the said settlement, for or on account of any act or order, or any other act, matter, or thing whatsoever, committed, ordered, or done by them in their public capacity, or acting as Governor-General, or Governor and Council; nor shall the said Court have or exercise any jurisdiction, in any matter concerning the revenue, under the management of the said Governor and Council respectively, either within, or beyond the limits of the said town, or the forts or factories subordinate thereto, or concerning any act done according to the usage and practice of the country, or the regulations of the Governor and Council. And we further will and declare, that no person shall be subject to the jurisdiction of the said Court, for or by reason of being a landowner, landholder, or farmer of land, or of land-rent, or for receiving a pension or payment in lieu of any title to, or ancient possession of land, or land-rent, or for receiving any compensation or share of profits for collecting rents payable to the public out of such lands or districts as are actually farmed by himself, or those who are his undertenants, by virtue of the farm, or for exercising within the said lands or farms any ordinary or local authority,

Certain cases in which the Court shall not have any jurisdiction.

commonly annexed to the possession or farm thereof, or for or by reason of his becoming security for the payment of the rents reserved, or otherwise payable out of any lands or farms, or farms of lands, within the dominions subject to the said Government of Madras. And no person, for or by reason of his being employed by the said Company, or the Governor and Council, or by any person deriving authority under them, or for or on account of his being employed by a native, or the descendant of a native of Great Britain, shall become subject to the jurisdiction of the said Court, in any matter of inheritance or succession to goods, or lands, or in any matter of dealing or contract between party and party, except in actions for wrongs or trespasses only. And provided also, and we do further declare, that no action for wrong or injury shall lie against any person whatever, exercising a judicial office in any country Court, for any judgment, decree, or order of such Court, or against any person for any act done by, or in virtue of the order of such Court. And in case any information is intended to be brought against any such person or officer, the same shall be brought and proceeded in, in the same manner, and to all intents and purposes in the same form, and to the same effect, as such informations are directed to be proceeded in before the Supreme Court of Judicature at Calcutta in Bengal, by an Act passed in the twenty-first year of our reign, entitled "An Act to explain and amend so much of an Act made in the Thirteenth Year of the Reign of His present Majesty, entitled 'An Act for establishing certain regulations for the better management of the affairs of the East-India Company, as well in India as in Europe,' as relates to the administration of Justice in Bengal, and for the relief of certain persons imprisoned at Calcutta in Bengal, under a judgment in the Supreme Court of Judicature, and also for indemnifying the Governor-General and Council of Bengal, and all officers who have acted under their orders or authority, in the undue resistance made to the Process of the Supreme Court."

The method of commencing and prosecuting Civil Suits.

XXIV. And to the end that justice may be the more speedily and effectually administered in the said Supreme Court of Judicature at Madras, our will and pleasure is, and we do hereby further, for us, our heirs and successors, grant, ordain, and appoint, that upon any cause of action, upon which the

said Court can hold plea, it shall be lawful and competent for any person whatever, by himself or his lawful attorney, duly admitted and enrolled in and by the said Court, in the manner herein provided in that behalf, to prefer to the said Court, and file therein of record, a plaint or bill, in writing, containing the cause of action or complaint, whereupon the said Court shall, and is hereby authorized to award and issue a summons, or precept in nature of a summons, in writing, to be prepared in manner abovementioned, directed to the said Sheriff, and containing a short notice of the cause of action set forth in the said plaint, and commanding the said Sheriff to summon the person, against whom the said plaint shall have been filed, to appear at some certain time and place therein to be specified, to answer the said plaint; which precept, and the execution thereof, the said Sheriff shall duly return to the said Court, and the person or persons so summoned shall accordingly appear, and may plead such matter in abatement, bar, or other avoidance of the said plaint, or otherwise as he, she, or they shall be advised; and after such appearance, the said Court shall proceed from time to time, giving reasonable days to the parties to hear their respective allegations, as justice may require, and examine the truth thereof upon the oath or oaths of such competent and credible witnesses as they shall produce respectively; to which end we hereby authorize and empower the said Court, at the request of either of the said parties, to award and issue a summons, or precept in the nature of a summons, to be prepared in manner before-mentioned, and directed to every one of such witnesses, commanding him or her to appear at a time and place to be specified in such summons, to depose his or her knowledge touching the suit so depending between the parties, naming them, and specifying at whose request such summons shall have issued; and upon the appearance of the said witnesses, or any of them, the said Court may, and is hereby required to order and award to them, and each of them, such reasonable sum of money, for his, her, or their expense, as the said Court shall think fit, whether such witnesses shall be examined or not; the same to be paid forthwith by the party at whose request the said summons shall have issued; and if the said sum of money, so ordered and awarded, shall not be forthwith paid or secured to such witnesses, to the satisfaction of the

Witnesses to be summoned.

said Court, the party, to whom it shall belong to pay the same, shall not only lose the benefit of the testimony of such witnesses, but shall be compelled to pay him or her the money so ordered and awarded, by such ways and process as are herein provided for levying and enforcing the payment and satisfaction of money recovered by judgments of the said Court. And the said Court is hereby authorized and empowered to administer to such witnesses, and others, whom they may see occasion to examine, proper oaths and affirmations[1]; that is to say, to such persons as profess the Christian religion, an oath or affirmation according to the form used in England in like cases; and to others, an oath or oaths, or affirmations, in such manner and form as the said Supreme Court of Judicature at Madras shall esteem most binding upon their consciences respectively. And the said Court is hereby authorized and required to cause such witnesses, so sworn or affirming, to be examined, touching the matters in question; and in all cases where, by reason of the amount in value of the matter in dispute, an appeal is allowed, by these our letters patent, from the judgment or determination of the said Court (but not in any cases of less value), the said Supreme Court of Judicature at Madras is hereby authorized and required to reduce the depositions of the witnesses, so to be examined, or cause the same to be reduced, into writing, and subscribed by the several witnesses, with their names or other mark, and to file the same of record. And in case any person, so summoned, shall refuse, or wilfully neglect to appear and be sworn, or to affirm, and be examined, and subscribe his or her deposition, as the said Court shall appoint, the said Court is hereby empowered to punish such person, so refusing, or wilfully neglecting, as for a contempt, by fine or by imprisonment, or other corporal punishment, not affecting life or limb.

And are to be sworn in such way as may be most binding on their consciences.

Witnesses, in contempt, to be fined or imprisoned.

[2]XXV. Provided always, that no person, being a native of India, shall be compelled or compellable, or enforced to appear in the said Court, by virtue of any summons to

Proviso, that native witnesses are not to be called

[1] See 9th Geo. IV. c. 74. s. 36.

[2] This and the next clause are omitted in the Charter of Bengal.

upon, otherwise than they could be called upon by a Native Court.

appear as a witness, or to appear in any other manner, or to give testimony, in any other form, than such person could or might have been called upon to appear and give testimony before any Native Court, according to the laws and usages of the natives; and no such native shall be liable to any punishment, for any contempt in not appearing, or submitting to be sworn and examined, in any other form or manner than such person could or might have been called upon to appear and give testimony before any such Native Court.

The Court to give judgment according to justice and right.

XXVI. And we do further give to the said Supreme Court of Judicature at Madras full power and authority, upon examining and considering the several allegations of the said parties to such suit, or of the complainant alone, in case the defendant should make default after appearance, or say nothing, or confess the plaint, and on examining and considering the depositions of the witnesses, to give judgment and sentence, according to justice and right, and also to award and order such costs to be paid by either, or any of the parties, to the other or others, as the Court shall think just.

And to award execution against the goods, lands, or person of the debtor.

XXVII. And we do further authorize and empower the said Supreme Court of Judicature at Madras to award and issue a writ, or writs, or other process of execution, to be prepared in manner before mentioned, and directed to the said Sheriff, for the time being, commanding him to seize and deliver the possession of houses, lands, or other things, recovered in and by such judgment, or to levy any sum of money which shall be so recovered, or any costs which shall be so awarded, as the case may require, by seizing and selling so much of the houses, lands, debts, or other effects, real and personal, of the party or parties against whom such writs shall be awarded, as will be sufficient to answer and satisfy the said judgment, or to take and imprison the body or bodies of such party or parties, until he, she, or they shall make such satisfaction, or to do both, as the case may require. And we direct and appoint, that the several debts, to be seized as aforesaid, shall from the time the same shall be extended and returned into the said Supreme Court, be paid and payable, in such manner and form

as the said Court shall appoint, and no other; and such payment, and no other, shall, from thenceforth, be an absolute and effective discharge for the said debts, and every of them respectively. And we do hereby further authorize and empower the said Supreme Court to make such further and other interlocutory rules and orders, as the justice of the proceeding may seem to require. And in case the party, so summoned as aforesaid, shall not appear upon the return of such summons, or precept, as aforesaid, according to the exigence thereof, or if the cause of action as contained in such plaint, as aforesaid, shall exceed the value of fifty pagodas, or shall be in the nature of an enormous personal wrong, and in either or any of the said cases, the said Court, or the Chief Justice, or any of the Justices of the said Court, shall be satisfied, by affidavit or affirmation, to be filed of record, that the case is such as to require security, then, after return of such summons, or in lieu thereof, the said Court, or the Chief Justice, or any of the Justices of the said Court, (the orders and acts of the said Chief Justice and Justices, or any of them, in this respect, out of Court, to be subject to the review and control of the Court,) is hereby authorized and empowered to award and issue a writ, or warrant, directed to the said Sheriff, commanding him to arrest and seize the body of such defendant, and to have the same, at a time and place in the said writ to be specified, before the said Court, to answer the said plaint. And the said Court may, in and by the said writ or warrant, authorize the said Sheriff to deliver the body of such defendant, so arrested, to sufficient bail, that such defendant shall appear, at a time and place mentioned in such writ or warrant, and in all things perform and fulfil the exigence thereof: and upon the appearance of such defendant, in and before the said Court, we do hereby authorize and empower the said Court to commit him to prison, to the said Sheriff, unless and until he shall give bail, to the satisfaction of the said Court, for paying the debt, damages, and costs, which shall be recovered against him in such action, or for rendering himself to prison: and in default thereof, that the bail will pay such debt, damages, and costs for him; which bail we hereby empower the said Court to take, and thereupon to deliver the body of the

And to make interlocutory orders.

And in certain cases to hold to bail.

said defendant to bail. And if the said Sheriff shall make return upon either of the said writs of summons, or capias, that the defendant is not to be found within the jurisdiction of the said Court, and the plaintiff, or some other person, shall, by affidavit, or, in the case of a Quaker, by affirmation, in writing or otherwise, to the satisfaction of the said Court, make proof, verifying the plaintiff's demand, we do hereby grant, ordain, and appoint, that the said Court shall and may award and issue a writ, in the nature of a writ of sequestration, to be prepared in manner above mentioned, and directed to the said Sheriff, commanding him to seize and sequester the houses, lands, goods, effects, and debts of such defendant, to such value as the said Court shall think reasonable and adequate to the said cause of action, so verified as aforesaid, and the same to detain, till such defendant shall appear, and abide such order of the said Court, as if he had appeared on the former process. And the said Court shall and is hereby authorized and empowered, according to their discretion, either to cause the said goods to be detained in specie, or to be sold, and to give day to such defendant, by proclamation, in open Court, from time to time, not exceeding two years in the whole; and if such defendant shall not appear on the last day, which the said Court, in their discretion, shall think proper to give, it shall be lawful, and the said Court is hereby authorized to proceed, *ex parte*, to hear, examine, and determine the said plaint and suit, or cause of action, and to give such judgment therein, and award and order such costs, as aforesaid. And if judgment shall, in such case, pass for the plaintiff, the said Court is hereby authorized and empowered to award and issue a writ to the said Sheriff, to be prepared in manner above mentioned, commanding him to sell the said houses, lands, goods, effects, and debts, so seized and sequestered, and to make satisfaction out of the produce thereof, to the plaintiff, for the duty or sum so recovered, and his costs, and to return the overplus, if any there be, after satisfying the said judgment and costs, and the expenses of the said sequestration, to such person, in whose possession the said effects were seized, or otherwise to reserve the same,

Effects of defendant not appearing, or not to be found, may be sequestered.

And the goods sold to pay the debt when adjudged, which after a time the Court may do *ex parte*.

for the use of the said defendant, as occasion shall require. And if such effects shall not be sufficient to produce the sum so to be recovered, and the said costs, the said Court is hereby further empowered to award and issue such process of execution for the deficiency, as is herein provided for levying money recovered by judgment, and costs; and if judgment shall, in such last-mentioned case, pass for the defendant, the said Court is authorized and empowered to award and order the costs of the said suit, and the expense of the said sequestration, and all damages occasioned thereby to be paid by the said plaintiff to the said defendant, or his attorney, or the person in whose possession the said effects were seized; the same to be levied by such process as is hereinbefore provided for levying costs: and the said debts, from the time of their being so seized and extended, and returned into Court, shall be payable in such a manner as the said Court shall direct, and no other.

And if insufficient further execution may be awarded.

XXVIII. And we do hereby further will, direct, and ordain, that the said Court, hereby established, shall frame such process, and make such rules and orders for the execution of the same, in all suits, civil and criminal, to be commenced, sued, or prosecuted, within their jurisdiction, as shall be necessary for the due execution of all or any of the powers hereby committed thereto, with an especial attention to the religion, manners, and usages of the native inhabitants, living within its jurisdiction, and accommodating the same to their religion, manners, and usages, and to the circumstances of the country, so far as the same can consist with the due execution of law, and the attainment of substantial justice.

Court empowered to frame rules and process.

XXIX. Provided always, and we do hereby further ordain and direct, that all forms of process, and rules and orders for the execution thereof, which shall be framed by the said Court, shall be transmitted, from time to time, by the first convenient opportunity, after the same shall be so framed, to the President of the Board of Commissioners for the affairs of India, to be laid before us, our heirs or successors, for our and their royal approbation, correction, or refusal: and we ordain and direct, that such process shall be used, and such rules shall be observed,

Forms of process, and rules and orders, to be transmitted to the President of the Board of Commissioners for the affairs of India, to be laid before the King, for his approbation

and correction.

until the same shall be repealed or varied; and in the last case, with such variation as shall be made therein.

Provision for the prosecution of suits against the East-India Company.

The Governor and Council of Fort St. George are to appoint an attorney for the Company.

XXX. And we do hereby, for us, our heirs and successors, further grant, ordain, and appoint, that the said Governor and Council of Fort St. George, and their successors, shall and may, from time to time, by their sufficient warrant to be filed of record in the said Supreme Court of Judicature at Madras, name and appoint some sufficient person, resident in the said town of Madraspatnam, to be the attorney of the said United Company, who shall remain and act as attorney to the said Company, so long as he shall reside in the said town, or until some other fit person, there resident, shall be appointed in his place, in manner above mentioned. And if any such plaint, as aforesaid, shall be filed in the said Court against the said Company, the said Court may and is hereby empowered to award and issue such summons or precept, as aforesaid, directed to the said Sheriff, commanding him to summons the said Company, by their said attorney, to appear, at the time and place therein to be specified, to answer to the said plaint; and the Sheriff shall serve the same upon the said attorney, and the said attorney shall thereupon appear for the said Company: and if the said Company shall not appear, in manner aforesaid, upon the return of the said writ, the said Court may, and is hereby authorized, upon such default, to award and issue a writ, to be prepared in manner above mentioned, and directed to the said Sheriff, commanding him to seize and sequester such and so much of the estate and effects of the said Company, as, upon the circumstances, the said Court shall think fit, to compel the appearance of the said Company, at the time and place which shall be specified for that purpose, in such writ of sequestration; and, for default of appearance upon the return of such last-mentioned writ, the said Court may, and is hereby empowered to issue such other writ or writs of sequestration, until an appearance of the said Company shall be duly entered and recorded in the said Court: and, after such appearance, the said Court shall and may proceed to hear and examine, try and determine the said action and suit, in manner before mentioned. And if judgment shall be given in such action or suit against the said

Company, the said Court may, and is hereby empowered to award and order reasonable costs to be paid by the said Company, and to cause the debt or damages and costs, so awarded, to be raised and levied of the estates, goods, and chattels of the said Company, in such manner as is hereinbefore provided, for execution to be had in other actions and suits. And if the said Governor and Council shall refuse or neglect, at any time, to make and appoint such attorney of record, the said Court is hereby empowered and authorized to name an attorney for the said Company, upon record, upon whom process shall, in like manner, be served. And the said Company may also sue in the said Supreme Court of Judicature at Madras, in the same manner, and to the same effect, as any other persons, within the jurisdiction thereof, can or may do; and if judgment shall be given against the said Company, the said Court of Judicature may order reasonable costs to be paid by them to the defendant, and to be raised and levied out of their lands, houses, debts, estates, goods, and chattels, in such manner as is herein provided for execution of judgment on other occasions. And if the said Company, after four sequestrations, and after the expiration of two years from the service of the summons above mentioned, shall not appear, then the said Court may, and is hereby required, if the plaintiff or plaintiffs shall, by affidavit (or, being a Quaker, by affirmation, in writing or otherwise), to the satisfaction of the said Court, make proof, verifying his, her, or their demand, proceed to hear, examine, try, and determine the said plaint and cause, and to give such judgment therein, and award such costs, as aforesaid; and, in case judgment shall pass for the plaintiff, the said Court is hereby authorized and empowered to award and issue a writ to the said Sheriff, to be prepared in manner before mentioned, commanding him to sell the goods and effects, so seized and sequestered, and to make satisfaction, out of the produce thereof, to the plaintiff or plaintiffs, for the debt so recovered, and his, her, or their costs, and to return the overplus (if any there be) after satisfying the said judgment and costs and expenses of the said sequestration, to such person or persons, in whose possession the said effects were so seized, to and for the use of the said United Company: and if such effects shall not be sufficient to

In default whereof, the Court may name one.

The Company may sue in the Court as any other persons.

produce the sum so to be recovered, and the said costs, the said Court is further empowered to award and issue such process of execution for the deficiency, as is herein provided for levying money recovered by judgment, and costs. And if judgment shall, in any case, pass for the said Company, the said Court is hereby authorized and empowered to award and order the costs of the said suit, and the expenses of the said sequestration, and all the damages occasioned thereby (the same being first taxed, ascertained, and attested, by the proper officers) to be paid by the said plaintiff or plaintiffs, to the person or persons in whose possession the said effects were seized, to and for the use of the said Company; and the same shall be levied by such process as is herein before provided for levying costs.

An equitable jurisdiction is then given to this Court, similar to the Court of Chancery.

XXXI. And it is our further will and pleesure, and we do hereby, for us, our heirs and successors, grant, ordain, and establish, that the said Supreme Court of Judicature at Madras shall also be a Court of Equity, and have equitable jurisdiction over the person or persons hereinbefore described and specified, or limited for its ordinary civil jurisdiction as aforesaid, subject to the restrictions and exceptions hereinbefore, in that behalf, expressed or contained, and not otherwise; and shall and may have full power and authority to administer justice, in a summary manner, according, or as near as may be, to the rules and proceedings of our High Court of Chancery in Great Britain. And upon a bill filed to issue subpœnas and other process, under the seal of the said Court, to compel the appearence, and answer upon oath, of the parties therein complained against, and obedience to the decrees and orders of the said Court of Equity, in such manner, and form, and to such effect, as our High Chancellor of Great Britain doth or lawfully may, under our great seal of Great Britain, or as near the same as the circumstances and condition of the places and persons under their jurisdiction, and the laws, manners, customs, and usages of the native inhabitants, will admit.

With similar authority over the persons & estates of infants and lunatics.

XXXII. And we do hereby authorize the said Supreme Court of Judicature at Madras to appoint guardians and keepers for infants, and their estates, according to the order and course observed in that part of Great Britain

called England; and also guardians and keepers of the persons and estates of natural fools, and of such as are or shall be deprived of their understanding or reason, by the act of God, so as to be unable to govern themselves and their estates, which we hereby authorize and empower the Supreme Court of Judicature at Madras to inquire, hear, and determine, by inspection of the person, or by such other ways and means, by which the truth may be best discovered and known.

Also criminal jurisdiction as a Court of Oyer and Terminer.

XXXIII. And it is our further will and pleasure, and we do hereby grant, order, ordain, and appoint, that the said Supreme Court of Judicature at Madras shall also be a Court of Oyer and Terminer, and Gaol Delivery, in and for Fort St. George, and the Town of Madras and the limits thereof, and the factories subordinate thereto, and shall have and be invested with the like power and authority as Commissioners or Justices of Oyer and Terminer, and Gaol Delivery, have, or may exercise, in that part of Great Britain called England, to inquire, by the oaths of good and sufficient men, of treasons, murders, and other felonies, forgeries, perjuries, trespasses, and other crimes and misdemeanors, heretofore had, made, done, or committed, or which shall hereafter be had, done, or committed, within Fort St. George, and the said town of Madras, or the limits thereof, or the factories subordinate thereto [1]:

Precept to Sheriff to summon Grand Juries.

and for that purpose to issue their warrant or precept, to be prepared in manner above-mentioned, and directed to the said Sheriff, commanding him to summon a convenient number, therein to be specified, of the principal inhabitants, resident in Fort St. George, or the said town of Madras, being persons so heretofore described and distinguished as British subjects of us, our heirs and successors, as aforesaid,[2] to attend and serve, at a time and place therein also to be specified, as a Grand Jury, or inquest, for us, our heirs and successors, and present to the said Court, such crimes and offences as shall come to their knowledge, and the said crimes and offences to hear and determine, by the oaths of other good and sufficient men, being persons so heretofore described and distinguished as British

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[1] 9th Geo. IV. c. 74. ss. 56. 127.

[2] 7th Geo. IV. c. 37. s. 1.; and see 2d and 3d Will. IV. c. 117. s. 2.

subjects of us, our heirs and successors, and resident in Fort St. George, or the said town of Madras, or the limits thereof, or the factories subordinate thereto: and for that purpose to issue a summons or precept, prepared in such manner as is hereinbefore mentioned, and directed to the said Sheriff, commanding him to summon a convenient number, to be therein specified, of such persons so heretofore described and distinguished, as British subjects, as aforesaid, to try the said indictment or inquest. And if any person or persons to be summoned upon such Grand or Petit Jury, as aforesaid, shall refuse or neglect to attend, according to such summons, and be sworn upon inquest, we do hereby further empower the said Supreme Court of Judicature at Madras to punish the said contempt, by fine, or by imprisonment for a reasonable time, to be limited, or by both. And we do further empower the said Supreme Court of Judicature at Madras, in like manner, and under the like penalties, to cause all such witnesses as justice shall require to be summoned, and to administer to them, and each of them, the proper oaths; that is to say, to such as profess the Christian religion, an oath in such manner and form as the same would have been administered in England; and to others, such oaths, and in such manner, as the said Court shall esteem to be most binding upon their consciences; and to proceed to hear, examine, try, and determine the said indictments and offences, and to give judgment thereupon, and to award execution thereof, and in all respects to administer criminal justice, in such or the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of, as our Courts of Oyer and Terminer, and Gaol Delivery, do, or may in that part of Great Britain called England, due attention being had to the religion, manners, and usages, of the native inhabitants.

To summon Petit Juries.

Criminal Jurisdiction, as to offences committed by any of the King's subjects in the territories of foreign princes.

XXXIV. And we do further authorize and empower the said Supreme Court of Judicature of Madras, in like manner, to inquire, hear, and determine, and to award judgment and execution of, upon, and against all treasons, murders, felonies, forgeries, perjuries, crimes, extortions, misdemeanors, trespasses, wrongs, and oppressions, had, done, or committed, or which shall hereafter be had, done, or committed, by any of our subjects, in

any of the territories subject to, or dependent upon, the Government of Madras, or within any of the territories which now are, or hereafter may be, subject to, or dependent upon, the said Government, or within any of the dominions of the native Princes of India, in alliance with the said Government; and for that purpose to award and issue a writ or writs to the said Sheriff, prepared in manner before mentioned, commanding him to arrest and seize the body or bodies of such offender or offenders, and bring him or them to Fort St. George aforesaid, and him or them to keep, until he or they shall be delivered by due course of law, and to do all other acts which shall be necessary, as well for the due administration of criminal justice, as for any other purpose or purposes, in as ample manner and form as might have been done by the Court of Oyer and Terminer at Fort St. George, as established by the said Charter of Justice, so granted, as aforesaid, by our said royal grandfather, or by the said Charter so granted by us, as hereinbefore mentioned, or by virtue, or under the authority of any Act or Acts of Parliament, relative thereto, and in such manner and form, as nearly as the circumstances and condition of the case will admit of, as our Court of Oyer and Terminer, and Gaol Delivery, may do, in that part of Great Britain called England. And we further ordain and establish, that in any case it shall not be lawful for any offender to object to the locality of the jurisdiction of the Court, or of the Grand or Petit Jury, summoned as hereby directed; but he shall be indicted, arraigned, tried, convicted, and punished, or acquitted or demeaned, in all respects, as if the crime had been committed within Fort St. George, or the town of Madras, or the limits thereof, or the factories subordinate thereto.

Exception of the Governor-General and the Governor and Council of Fort Saint George, in certain cases, from the criminal jurisdiction.

XXXV. Provided always, and we do hereby declare, that the said Court shall not be competent to hear, try, and determine, any indictment or information against the Governor-General of Fort William in Bengal, or the Governor, or any of the Council, of Fort St. George, not being for treason or felony, which the Governor-General, Governor, or any of the Council, shall or may be charged with having committed, within the jurisdiction of the same.

The Court of Oyer and Terminer may reprieve execution of any capital sentence, until the King's pleasure is known.

XXXVI. And whereas cases may arise, wherein it may be proper to remit the general severity of the law,[1] we do hereby authorize and empower the said Court of Oyer and Terminer, and Gaol Delivery, to reprieve and suspend the execution of any capital sentence, wherein there shall appear, in the judgment of the said Court, a proper occasion for mercy, until our pleasure shall be known: and the said Court shall, in such case, transmit to us, under the seal of the said Court, a state of the case, and of the evidence, and of the reasons for recommending the criminal to our mercy, or for such reprieve or suspension, as the case may be; in the mean time the said Court shall cause such offender to be kept in strict custody, or deliver him or her out to sufficient bail or mainprize, as the circumstances shall seem to require.

The Court to exercise ecclesiastical jurisdiction.

XXXVII. And it is our further will and pleasure, and we do hereby for us, our heirs and successors, grant, ordain, establish, and appoint, that the said Supreme Court of Judicature at Madras shall be a Court of Ecclesiastical Jurisdiction, and shall have full power and authority to administer and execute, within and throughout Fort St. George, and the town of Madras, and the limits thereof, and the factories subordinate thereto, and all the territories which now are, or hereafter may be, subject to, or dependent upon, the said Government, and towards and upon all persons, so described and distinguished by the appellation of British subjects, as aforesaid, there residing, the ecclesiastical law, as the same is now used and exercised in the diocese of London, in Great Britain, so far as the circumstances and occasion of the said fort, town, territories, and people, shall admit or require: and to that purpose, we give and grant to the said Supreme Court of Judicature at Madras full power and authority to take cognizance of, and proceed in all causes, suits, and business, belonging and appertaining to the Ecclesiastical Court, before the said Supreme Court of Judicature at Madras, in whatsoever manner to be moved, as well at the instance or promotion of

[1] But see 9th Geo. IV. c. 74. s. 29., by which the Court can order capital offenders to be transported instead of left for execution. Also Act VII. of 1837. and Act XXXI. of 1838.

parties as of offices, mere or mixed, against any of the said subjects, residing in the said fort, town, territories, or districts, and which, by the law and custom of the said diocese of London, are of ecclesiastical cognizance; and the said causes, suits, and business, with their incidents, emergents, and dependents, and whatsoever is thereto annexed and therewith connected, to hear, dispatch, discuss, determine: and also to grant probates under the seal of the said Court of the said Recorder of Madras[1], of the last wills and testaments of all or any of the said subjects of us, our heirs and successors, dying and leaving personal effects, within the said territories or districts, respectively, and of all persons who shall die or have effects within the places aforesaid; and to commit letters of administration, under the seal of the said Court, of the goods, chattels, credits, and all other effects whatsoever, of the persons aforesaid, who shall die intestate[2], or who shall not have named an executor, resident within the said fort, town, territories, or districts, or where the executor, being duly cited, according to the form generally used for that purpose in the said diocese of London, shall not appear, and sue forth such probate, annexing the will to the said letters of administration, when such person shall have left a will without naming any executor, or any person for executor, who shall then be alive and resident within the said fort, town, territories, or districts, and who, being duly cited thereunto, will appear and sue forth a probate thereof; and to sequester the goods and chattels, credits, and other effects whatsoever, of such persons, so dying, in cases allowed by law, as the same is and may now be used in the said diocese of London; and to demand, require, take, hear, examine, and allow, and if occasion require, to disallow and reject the account of them, in such manner and form as is now used, or may be used, in the said diocese of London; and to do all other things whatsoever, needful and necessary in that behalf.

and grant probates of wills, and letters of administration, of persons dying or having effects within its jurisdiction.

XXXVIII. Provided always, and we do hereby authorize and require

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[1] Thus in Sir T. Strange's edition of the Charter: this, of course, is an error: it should clearly be, "the said Supreme Court of Judicature at Madras."

[2] See 39th and 40th Geo. III. c. 79. s. 21. 55th Geo. III. c. 84. s. 2. 4th Geo. IV. c. 81. s. 51. 6th Geo. IV. c. 61.

the said Supreme Court of Judicature at Madras, in such cases as aforesaid, where letters of administration shall be committed with the will annexed, for want of an executor appearing, in due time, to sue forth the probate, to reserve in such letters of administration full power and authority to revoke the same, and to grant probate of the said will to such executor, whenever he shall appear and sue forth the same. And we do hereby further authorize and require the said Supreme Court of Judicature at Madras to grant and commit such letters of administration, according to the course now used, or which lawfully may be used in the said diocese of London, to the lawful next of kin of such persons so dying, as aforesaid. And, in case no such person shall then be residing within the jurisdiction of the said Court, or being duly cited, shall not appear and pay the same, to the principal creditor of such person, or such other creditor as shall be willing or desirous to obtain the same; and for want of any creditor appearing, then to the Registrar of the said Court, in such manner, and subject to such power of revocation, as in and by the said recited Act of Parliament, passed in the fortieth year of our reign, is for that purpose provided.

Administrators are to give security, by bond, for duly administering effects as in the diocese of London.

XXXIX. And we do hereby further enjoin and require, that every person, to whom such letters of administration shall be committed, other than the Registrar of the said Court, taking administration under the authority of the said Act of the fortieth year of our reign, shall, before the granting thereof, give sufficient security, by bond, to the Registrar[1], or Chief Clerk of the said Supreme Court of Judicature at Madras, for the payment of a competent sum of money, with two or more able sureties (respect being had in the sum therein to be contained, and in the ability of the sureties to the value of the estate, credits, and effects of the deceased); which bond shall be deposited in the said Court, among the records thereof, and there safely kept; and a copy thereof shall be also recorded among the proceedings of the said Court; and the condition of the said bond shall be to the following effect:—"That if the above-bounden administrator

[1] Instead of to the Junior Judge, as provided by the Bengal Charter, Sec. XXIII. *supra*, p. 575.

of the goods and effects of the deceased do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, credits, and effects of the said deceased, which have or shall come to the hands, possession, or knowledge of him the said administrator, or the hands or possession of any other person or persons for him; and the same, so made, do exhibit, or cause to be exhibited, into the Supreme Court of Judicature at Madras, at or before a day therein to be specified, and the same goods, chattels, credits, and effects of the deceased, at the time of his death, or which, at any time afterwards, shall come to the hands or possession of such administrator, or to the hands or possession of any other person, or persons, for him, shall well and truly administer, according to law; and further shall make, or cause to be made, a true and just account of his said administration, at or before a time therein to be specified; and all the rest and residue of the said goods, chattels, credits, and effects, which shall be found remaining upon the said administration account, the same being first examined and allowed of by the said Supreme Court of Judicature at Madras, shall deliver and pay unto such person or persons respectively, as shall be lawfully entitled to such residue; then this obligation to be void and of none effect, or else to remain in full force and virtue." And

In what cases the bond may be put in suit.

in case it shall be necessary to put the said bond in suit, for the sake of obtaining the effect thereof, for the benefit of any person or persons who shall appear to the said Supreme Court to be interested therein, such person or persons, from time to time, paying all such costs as shall arise from the said suit, or any part thereof, such person or persons shall, by order of the said Court, be allowed to sue the same, in the name of the said obligee, and the said bond shall not be sued in any other manner. And we do hereby authorize and empower the said Supreme Court of Judicature at Madras to order that the said bond shall be put in suit, in the name of the said Registrar or Chief Clerk, or his executors or administrators, whom we also authorize the said Court to name and appoint for that special purpose.

The Court may grant administration of effects at the

XL. And whereas many persons possessed of, or entitled to money or effects, within the limits of the jurisdiction hereby given to the said Supreme Court of Judicature at

settlement, though left by persons who died out of the settlement.

Madras, may die in other parts or countries, in aid, therefore, of the executors or next of kin, and creditors of the persons so dying, not within the said limits, we further, for us, our heirs and successors, grant and ordain, that the said Supreme Court of Judicature at Madras shall and may grant such probates of wills, and letters of administration, of any person dying out of the limits of the said jurisdiction, and leaving effects within the said limits, as the said Court is authorized to grant, in case of a person dying within the said limits, so far as may relate to such money or effects, as the person so dying was possessed of, or entitled to, at the time of his decease, within the limits of their said jurisdiction, and no farther.

The Supreme Court to be a Court of Admiralty.

XLI. And it is our further will and pleasure, and we do hereby grant, ordain, establish, and appoint, that the said Supreme Court of Judicature at Madras shall be a Court of Admiralty, in and for Fort St. George, and the said town of Madras, and the limits thereof, and the factories subordinate thereto, and all the territories which now are, or hereafter may be, subject to, or dependent upon, the said Government. And we do hereby commit and grant to the said Supreme Court of Judicature at Madras, full power and authority to take cognizance of, hear, examine, try, and determine, all causes, civil and maritime, and all pleas of contracts, debts, exchanges, policies of assurance, accounts, charter-parties, agreements, loading of ships, and all matters and contracts which, in any manner whatsoever, relate to freight or money due for ships hired and let out, transport money, maritime usury, bottomry, or respondentia, or to extortions, trespasses, injuries, complaints, demands, and matters civil and maritime, whatsoever, between merchants, owners, and proprietors of ships and vessels, employed or used within the jurisdiction aforesaid, or between others, contracted, done, had, or commenced, in, upon, or by the high seas, or public rivers, or ports, creeks, harbours, and places overflown, within the ebbing and flowing of the sea and high-water mark, within, about, and throughout the fort, town, factories, and territories aforesaid, the cognizance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in that part of Great Britain called England, together with all and singular

their incidents, emergents, and dependencies, annexed and connexed causes whatsoever; and to proceed summarily therein, with all possible dispatch, according to the course of our Admiralty of that part of Great Britain called England, without the strict formalities of law, considering only the truth of the fact, and the equity of the case.

Further Power, with regard to crimes maritime.

XLII. And we do further commit to the said Supreme Court of Judicature at Madras full power and authority to enquire, hear, try, examine, and determine, by the oaths of honest and lawful men, being persons so heretofore described and distinguished as British subjects, and not otherwise[1], all treasons, murders, piracies, robberies, felonies, maimings, forestalling, extortions, trespasses, misdemeanors, offences, excesses, and enormities, and maritime crimes whatsoever, according to the laws and customs of the Admiralty, in that part of Great Britain called England, done, perpetrated, or committed upon the high seas: and to fine, imprison, correct, punish, chastise, and reform parties guilty, and all violators of the law, usurpers, delinquents, contumacious absenters, masters of ships, mariners, rowers, fishers, shipwrights, and other workmen exercising any kind of maritime affairs, according to the said civil and maritime laws, ordinances and customs, and their respective demerits; and to deliver and discharge persons imprisoned in that behalf, who ought to be delivered, and to take recognizances, obligations, stipulations, and cautions, as well to our use as at the instance of other parties, and to put the same in execution, or to cause and command them to be executed; and also to arrest, or cause or command to be arrested, according to the civil law, and the ancient customs of our High Court of Admiralty, in that part of Great Britain called England, all ships, persons, things, goods, wares, and merchandizes, for the premises, and every of them, and for other causes whatsoever, concerning the same, wheresoever they shall be met with or found, in or throughout the said districts and jurisdictions aforesaid; and to compel all manner of persons, in that behalf, as the case shall require, to appear and answer in the said Court, with power of using any temporal

To punish offenders,

deliver and discharge.

May arrest ships.

See the Jury Act, 7th Geo. IV. c. 37.; and see 2d & 3d Will. IV. c. 117.

To compel persons to appear, under penalties.

Witnesses to answer.

coercion, and inflicting mulcts and penalties, according to the laws and customs aforesaid; and moreover to compel witnesses, in case they shall withdraw themselves for interest, fear, favour, or ill-will, or other cause whatsoever, to give evidence to the truth, in all and every cause or causes above mentioned, according to the exigencies of the laws, and to proceed in such cause or causes, according to the civil and maritime laws and customs, as well at the instance or promotion of parties, as of office, mere or mixed, as the case may require; and to promulge and interpose all manner of sentences and decrees, and to put the same in execution, according to the course and order of the Admiralty, as the same is now used in that part of Great Britain called England. Provided always, that the several powers and authorities herein given to the said Court to proceed in maritime causes, and according to the laws of the Admiralty, as herein expressed, shall extend, and be construed to extend, only to such persons as, pursuant to the provisions hereinbefore contained, are, and would be amenable to the said Supreme Court of Judicature at Madras in its ordinary jurisdiction.

According to the law, civil and maritime, as now is used in Great Britain.

Affidavits and affirmations, how to be taken.

XLIII. And we do hereby ordain and appoint, that all affidavits taken, in the said Court of Judicature at Madras, or before any Judge thereof, shall be made on oaths, administered in such form and manner as is before directed, in the case of witnesses to be examined before the said Court. Provided nevertheless, that in all civil cases the affirmation, in writing, of a Quaker, which the said Court, as the case may require, are hereby authorized and empowered to take, shall be of the same weight, authority, and effect, as an affidavit upon oath.

Power for the Court to appoint Commissioners to take affidavits, &c.

XLIV. And we do hereby further will, ordain, and declare, that it shall and may be lawful, to and for the said Supreme Court of Judicature at Madras, in any part of its jurisdiction, whether Common Law, Equity, Ecclesiastical or Admiralty, by Commission or Commissioners, under the seal of the said Court, to authorize and appoint any fit or proper person or persons, either generally or in any particular case, or for one or more turn or turns only, to receive the acknowledgments of recogni-

zances of bail and bail process, and to administer oaths for the justification of bail, and for the taking of any affidavit or affirmation, or for receiving and taking the answer, plea, demurrer, disclaimer, or examination of any party or parties to any suit, or for the examination of any witness or witnesses, upon interrogatories, either *de bene esse* or in chief, or any other occasion, and for the swearing executors and administrators in any suit, matter, or proceeding, which may be pending, or about to be instituted in the said Court, upon such occasions as the said Court shall think fit to issue such commissions. And we direct and ordain, that such Commission and Commissions, so to be issued, shall respectively be executed, acted under, and returned, if the same shall require any return, in such manner and form as such matters are usually transacted by Commissions, general or special, issued out of our Court of King's Bench at Westminster, or our High Court of Chancery, or the Ecclesiastical Court of the Diocese of London, or our High Court of Admiralty in England respectively. Provided always, that nothing herein contained shall extend to authorize or empower the issuing of any Commission or Commissions, for the examination of any witness or witnesses, upon any indictment or information for any offence whatsoever, to be tried and determined by and before the said Court.

Suitor's money and securities to be deposited with the Company's cash.

XLV. And we do further will and ordain, that all the monies, securities, and effects of the suitors of the said Court, which shall be ordered into Court, or to be paid, delivered, or deposited for safe custody, shall be paid or delivered unto, or deposited with, the Governor, or President and Council at Fort St. George, to be by them kept and deposited with the cash and effects of the said Company, subject to such orders and directions as the said Supreme Court of Judicature at Madras shall, from time to time, think fit to make, concerning the same, for the benefit of the suitors; the said United Company being responsible for the said monies, securities, and effects, in such manner, and subject to the same exceptions, as is mentioned in the said in part recited Charter of our said Royal Grandfather, with respect to the monies, securities, or effects, to be deposited with the said Governor, or President and Council, under the authority of the Mayor's Court thereby erected.

An Accountant-General to be appointed by the Court of Directors.

XLVI. And we do, for us, our heirs, and successors, give and grant unto the Court of Directors of the said Company, or the major part of them, full power and authority, from time to time, to name and appoint an officer, under the name of the Accountant-General of the Supreme Court of Judicature at Madras, and the same at their pleasure to remove, and another to appoint, who shall act, perform, and do, all matters and things necessary to carry into execution the orders of the said Court, relating to the payment or delivery of the suitors' money, effects, and securities, unto the Governor, or President and Council of the said United Company of Fort St. George, and taking the same out again, and keeping the accounts with the said Governor and Council, and Registrar, of the said Supreme Court of Judicature at Madras, and other matters relating thereto, under such rules, methods, and directions, as shall, from time to time, be made and given, under the hands of thirteen or more of the Court of Directors of the said Company; which rules, methods, and directions, we will and direct, shall be according to such rules, methods, and directions, as are observed by the Accountant-General of our High Court of Chancery in Great Britain, or as near thereto as may be, and as the situation and circumstances of affairs will permit.

Courts of Request and Quarter Sessions, &c., to be subject to this Court.

XLVII. And to the end that the Court of Request, and the Court of Quarter Sessions erected and established at Madras aforesaid, and the Justices and other Magistrates appointed for Fort St. George and the town of Madras, and the factories subordinate thereto, may better answer the ends of their respective institutions, and act conformably to law and justice, it is our further will and pleasure, and we do hereby further grant, ordain, and establish, that all and every the said Courts and Magistrates shall be subject to the order and controul of the said Supreme Court of Judicature at Madras, in such sort, manner, and form, as the inferior Courts and Magistrates of and in that part of Great Britain called England, are, by law, subject to the order and controul of our Court of King's Bench: to which end the said Supreme Court of Judicature at Madras is hereby empowered and authorized to award and issue a writ or writs of mandamus, certiorari, procedendo, or

error, to be prepared in manner above-mentioned, and directed to such Courts or Magistrates as the case may require, and to punish any contempt thereof, or wilful disobedience thereunto, by fine and imprisonment.

Appeal to the King in Council.

XLVIII. And it is our further will and pleasure, and we do hereby direct, establish, and ordain, that if any person or persons shall find him, her, or themselves aggrieved, by any judgment or determination of the said Supreme Court of Judicature at Madras, in any case whatsoever, it shall and may be lawful for him, her, or them, to appeal to us, our heirs, or successors, in our or their Privy Council,[1] in such manner, and under such restrictions and qualifications, as are hereinafter-mentioned, that is to say, in all judgments or determinations made by the said Supreme Court of Judicature at Madras in any civil cause, the party and parties against whom, or to whose immediate prejudice the said judgment or determination shall be or tend, may, by his or their humble petition to be preferred for that purpose to the said Court, pray leave to appeal to us, our heirs, or successors, in our or their Privy Council, stating in such petition the cause or causes of appeal. And in case such leave to appeal shall be prayed by the party or parties who is or are directed to pay any sum of money, or to perform any duty, the said Court shall, and is hereby empowered to award, that such determination or judgment shall be carried into execution, or that sufficient security shall be given for the performance of the said judgment or determination, as shall be most expedient to real and substantial justice. Provided always, that where the said Court shall think fit to order the judgment or determination to be executed, security shall be taken from the other party or parties, for the due performance of such judgment or order, as we, our heirs, or successors, shall think fit to make thereupon. And in all cases we will and require, that security shall also be given to the satisfaction of the said Court, for the payment of all such costs as the said Supreme Court of Judicature at Madras may think likely to be incurred by the said appeal, and also for the performance of such judgment or

Security on such appeal for costs and for performance of judgment.

[1] Sec. 6th & 7th Vict. c. 38; 7th & 8th Vict. c. 69.

order, as we, our heirs, or successors shall think fit to give or make thereupon: and upon such order or orders of the said Court thereupon made being performed to their satisfaction, the said Court shall allow the appeal, and the party or parties, so thinking him, her, or themselves aggrieved, shall be at liberty to prefer and prosecute his, her, or their appeal to us, our heirs, or successors, in our or their Privy Council, in such manner and form, and under such rules, as are observed in appeals made to us from our Plantations or Colonies, or from our islands of Guernsey, Jersey, Sarke, or Alderney.

Court on such appeal to transmit a copy of all evidence and proceedings.

XLIX. And it is our further will and pleasure, and we hereby direct and ordain, that in all such cases the said Supreme Court of Judicature at Madras shall certify and transmit, under the seal of the said Court, to us, our heirs, or successors, in our or their Privy Council, a true and exact copy of all evidence, proceedings, judgments, decrees, and orders, had or made in such causes appealed, so far as the same have relation to the matter of appeal.

In criminal suits the Court may allow or deny appeal, and regulate the terms.

L. And it is our further will and pleasure, that in all indictments, informations, and criminal suits, and causes whatsoever, the said Supreme Court of Judicature at Madras shall have the full and absolute power and authority to allow or deny the appeal of the party pretending to be aggrieved, and also to award, order, and regulate the terms upon which appeals shall be allowed, in such cases in which the said Court may think fit to allow such appeal.

Reservation of power to the King to refuse an appeal.

LI. And we do hereby also reserve to ourselves, our heirs, and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a judgment or determination of the Supreme Court of Judicature at Madras, to refuse or admit his, her, or their appeal thereupon, upon such terms, and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, correct, or vary such judgment or determination, as to us or them shall seem meet.

Court to execute judg-

LII. And we do further direct and ordain, that the said Court shall in all such cases conform to and execute, or

ments and orders of His Majesty.

cause to be executed, such judgments and orders as we shall think fit to make in the premises, in such manner as any original judgment, decree, or decretal, or other order or rule, by the said Supreme Court of Judicature at Madras, should or might have been executed.

No appeals to be allowed except the petition shall be preferred within six months, and unless the matter shall exceed 1000 pagodas.

LIII. Provided always, that no appeal shall be allowed by the said Court, unless the petition for that purpose shall be preferred within six months from the day of pronouncing the judgment or determination complained of, and unless the value of the matter in dispute shall exceed the sum of one thousand pagodas.[1]

Chief Justice and other Judges to be sworn.

LIV. And it is our further will and pleasure, and we do hereby direct, ordain, and appoint, that the said Chief Justice, and other Justices, forthwith after the arrival of this our Charter at Madras, if he or they shall then be there, or forthwith after his or their arrival there, shall assemble themselves, or so many of them as shall be able to assemble themselves, in the room or hall where the Court of the Recorder of Madras shall then be usually holden, or in some other proper room or place to be appointed for that purpose; and the said Chief Justice, if present, shall then and there take an oath, in the most solemn manner, that he will, to the best of his knowledge, skill, and judgment, duly and justly execute the said office of Chief Justice of the Supreme Court of Judicature at Madras, and impartially administer justice in every cause, matter, or thing, which shall come before him; and shall also take the oath of allegiance and supremacy, and make and subscribe the declaration against transubstantiation, in such manner and form as the same are, by law, appointed to be taken or made in Great Britain; of which oaths a record shall be forthwith made. And we do hereby authorize the said Puisne Justices, or such of them as shall then be present, to administer the said oaths and declarations, and make such record thereof, accordingly; and the said Puisne Justices, or such of them as shall then and there be present, shall take the like oaths, and make and subscribe the like declarations, only changing what ought to

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[1] See 3d & 4th Will. IV. c. 41., and Order in Council dated the 10th April 1833.

be changed, for that purpose, before the said Chief Justice if present, and if not, then each of the said Puisne Justices shall take such oath before the other of them; of which oaths, also, a record shall be forthwith made. And we do hereby authorize the said Chief Justice, and Puisne Justices respectively, to administer the said oaths and declarations, and record the same accordingly. And we do hereby further ordain and establish, that the said Chief Justice and Puisne Justices, and all and every succeeding Chief Justice and Puisne Justices, shall, before he or they shall be capable of exercising the said office or offices, respectively, take, in open Court, the like oaths, and subscribe the like declarations, only changing what ought to be changed for that purpose, whereof records shall be made, and filed among the other records of the Court, from time to time: and after the said Chief Justice, and the said Puisne Justices, or so many of them as shall be assembled at the time and place aforesaid, shall have taken the said oaths, and have made and subscribed the like declaration, the said Supreme Court of Judicature at Madras shall be proclaimed and published, in due manner, and proceed forthwith to the execution of the several authorities hereby vested in it.

LV. And it is our further will and pleasure, and we hereby grant and declare, that from and immediately after the publishing and proclaiming of the said Supreme Court of Judicature at Madras, so much of the said Charter, granted by us in the thirty-eighth year of our reign, as hereinbefore mentioned, as confers any jurisdiction whatsoever, civil or criminal, or ecclesiastical, upon the Court of the Recorder of Madras, shall cease and determine, and be absolutely void, to all intents and purposes; and all powers and authorities, by any Act or Acts of Parliament granted to, or vested in the said Court of the Recorder of Madras, at the said settlement, shall cease and determine, and be no longer exercised by the said Court; but the same shall and may be exercised by the said Supreme Court of Judicature at Madras, in the manner and to the extent herein directed.

After publishing of this Charter other Courts to cease.

LVI. Provided always, that no judgment or decree, or decretal, or other order, rule, or act of the said Court of the Recorder of Madras, legally pronounced, given, had, or done, in any of the jurisdictions, civil, criminal, or ecclesias-

And its authority over all matters depending is

given and transferred to the new Court.

tical, given to the said Court of the Recorder at Madras, before such publication and proclamation, as aforesaid, of the said new Court, hereby established, shall be hereby avoided, but shall remain in full force and virtue as if these presents had not been made; nor shall any indictment, information, action, suit, cause, or proceeding, depending in the said Court of the Recorder of Madras, whether originally instituted in such Court in any branch of its jurisdiction, or transferred from any other Court or Courts of Judicature, shall be abated, discontinued, or annulled; but the same shall be transferred in their then present condition, respectively, to, and subsist and depend in, the said Court, hereby established, according to the several jurisdictions hereby given to such Court, severally and respectively, to all intents and purposes, as if they had been respectively commenced, brought, found, presented, or recorded in the said Court, hereby established. And we do hereby authorize and empower the said Court, hereby established, to proceed accordingly, in all such indictments, informations, actions, suits, causes, and proceedings, to judgment and execution, and to make such rules and orders respecting the same, and also respecting any sum or sums of money belonging to the suitors of the said Court of the Recorder of Madras, or of any of the Courts, the jurisdictions whereof was transferred to the said Court of the Recorder of Madras, as the said Court of the Recorder of Madras might have made, or as the said Court hereby established is hereby empowered to make, in causes, suits, or proceedings commenced or depending before the said Court, hereby established: for which purpose it is our further will and pleasure, that all the records, muniments, and proceedings, whatever, of or belonging to the said Court of the Recorder of Madras, or which ought to be deposited with such Court, shall be delivered and deposited, and preserved amongst the records of the said Supreme Court of Judicature at Madras, hereby established. And it is our further will and pleasure, and we do hereby authorize and empower the said Supreme Court of Judicature at Madras (respect being had to the seasons of the year and the convenience of the suitors) to settle and appoint proper terms and law days, and days for sittings

And all the Records of the present Courts are to be preserved by the new Court.

Court to settle proper terms, &c.

after term, if necessary, and to change and vary such appointments as occasion shall require, and to proclaim, hold, and adjourn the Sessions of Oyer and Terminer, and Gaol Delivery, and Admiralty Sessions, as to them severally shall seem most expedient.

The Oyer and Terminer shall be held four times a year.

LVII. Provided nevertheless, that the said Court shall, and is hereby required, in each year to hold at the least four Sessions of Oyer and Terminer, and Gaol Delivery, within and for its limits, and more, if the same shall be found necessary for the convenience of the said settlement of Madras, and the ends of public justice.

Rules to be transmitted to the President of the Board of Commissioners for the affairs of India.

LVIII. Provided also, and it is our further will and pleasure, and we do hereby require and enjoin the said Court, as soon as any rules shall have been made for the appointment of terms, or law days, or for the variation of such appointment, by the first convenient opportunity after making or varying the same, to transmit a copy thereof, under the hands and seals of the Judges of the said Court, to the President of the Board of Commissioners for the affairs of India, to be laid before us, our heirs or successors, for our and their royal approbation and correction. And we ordain and direct, that such appointments shall be kept and observed, until the same shall be altered by us, our heirs or successors, and then with such variation or alteration as we, our heirs or successors, shall cause to be made therein. Provided also, and we do hereby further will and ordain, that, after the said terms and law days shall once have been fixed by the said Supreme Court, no variation to be made therein by the said Court shall take effect, until such variation shall have been approved and confirmed by us, our heirs or successors.

LIX. Provided always, and we do hereby direct and declare, that in all cases in which the person or persons of the Governor-General of Fort William, the Governor or President of Fort St. George, or any of the Counsellors of the said Presidency, or the Chief Justice, or any of the Puisne Justices of the said Supreme Court of Judicature at Madras, is and are hereby declared not to be subject or liable to be arrested or imprisoned, as aforesaid, and wherein a capias or process for arresting the body is hereby given and provided against other persons, it shall

and may be lawful for the said Courts, hereby established, respectively, to order the goods and estates of such persons so exempted from arrest and imprisonment, as aforesaid, to be seized and sequestered, or sold, if need be, until he or they, respectively, shall appear and yield obedience to the judgment, decree, or decretal, or other order or rule of the said Court.

LX. Provided always, and we do hereby direct and declare, that all offences committed by, or charged upon, the said Chief Justice, or any of the Puisne Justices of the said Supreme Court of Judicature at Madras, respectively, shall be heard, tried, and determined in the same manner as if the same were committed by, or charged upon, any of the Judges of the Supreme Court of Judicature at Calcutta.

General Clause as to powers of the new Courts to try all causes which may now be tried at Fort St. George.

LXI. And it is our further will and pleasure, and we do hereby grant and declare, the said Supreme Court of Judicature at Madras shall have full power and authority to hear, try, and determine, all and all manner of suits and actions, either civil or criminal, which by the authority of any Act or Acts of Parliament, or under the authority of our said letters patent of the thirty-eighth year of our reign, may now be tried or determined by the said Court of the Recorder at Madras; and that all powers, authorities, and jurisdictions, of what kind or nature soever, which by any Act or Acts of Parliament, or by the said letters patent, may be or are directed to be exercised by the said Court of the Recorder of Madras, shall and may be as fully and effectually exercised by the said Supreme Court of Judicature at Madras, as the same might have been exercised and enjoyed by the said Court of the Recorder of Madras.

Grants of fines to the East-India Company.

LXII. And furthermore, we, of our further, especial grace, certain knowledge, and mere motion, have given and granted, and by these presents, for us, our heirs and successors, do give, grant, and confirm, unto the said United Company of Merchants of England trading to the East Indies, and their successors, all such fines, amerciaments, forfeitures, penalties, or parts of penalties, and sums of money, whatsoever, as have heretofore been ordered, charged, adjudged, set, imposed, or awarded, upon or against any person or persons whomsoever, in or by any Court of

Justice or person at Madras, having lawful authority to order, charge, adjudge, set, impose, or award the same; and all such fines, amerciaments, forfeitures, penalties, or parts of penalties, and sums of money, which hereafter, during all the residue of the term of the continuance of the said United Company's exclusive trade, shall be ordered, adjudged, set, imposed, or awarded, upon or against any person or persons whatsoever, in or by the said Court, hereby established, or by any Court of Oyer and Terminer, and Gaol Delivery, or General Court of Quarter Sessions, or by any of the Justices of the Peace, Commissioners of Oyer and Terminer, or Gaol Delivery, for the said Presidency of Madras, or any of them, or by any person or persons there, having lawful authority to order, charge, adjudge, set, impose, or award the same, for or by reason of any offences, misdeameanors, defaults, contempts, neglects, or forfeitures, whatsoever, to have, hold, receive, levy, sue for, recover, and enjoy the same, to the said United Company and their successors for ever, in as large and ample manner, to all intents and purposes, as we, our heirs or successors, could or might have had, held, received, levied, sued for, recovered, and enjoyed the same, if these presents had not been made, without any account, or other matter or thing to be rendered or paid for the same, unto us, our heirs or successors; subject, nevertheless, to the several powers and authorities by these our letters granted to, or vested in, the said Court, hereby established, to discharge, mitigate, or set over, any of such fines, amerciaments, forfeitures, penalties, or sums of money, respectively, according to the true intent and meaning hereof.

Power for the Courts to make satisfaction to prosecutors out of fines.

LXIII. Provided always, nevertheless, that it shall and may be lawful, and we hereby authorize and empower the said Supreme Court of Judicature at Madras to make such satisfaction to prosecutors of informations or indictments, as to the said Court shall seem reasonable and fit, out of any fine or fines to be set or imposed upon any person or persons who shall be convicted upon such proceedings respectively, and to order and direct such satisfaction to be paid accordingly, as hereinafter directed.

Power given to the East-In-

LXIV. And we do hereby, for us, our heirs and successors, give and grant unto the said Company full power

dia Company to recover the fines.

and authority to sue for, recover, and levy, all and every the said fines, amerciaments, forfeitures, penalties, and sums of money, by any action or actions of debt to be brought in the said Court, hereby established, or by such other suits, actions, ways, means, and proceedings, as may be lawfully had and prosecuted in the said Court, in their corporate name, or by any other lawful ways or means, either in the name of us, our heirs or successors, or of the said United Company of Merchants of England trading to the East Indies, or their successors; and to collect, take, seize, and levy the said fine, amerciaments, forfeitures, penalties, and sums of money, in and by these presents granted, or mentioned to be granted, from time to time, by the proper officers and ministers of the said United Company of Merchants of England trading to the East Indies, and their successors, to the only proper use and behoof of them and their successors, without any writ, warrant, or other process of the Exchequer, of us, our heirs and successors, or any other Court or Courts, whatsoever and wheresoever to be had and obtained in that behalf, any usage or custom to the contrary thereof, in anywise, notwithstanding: subject, nevertheless, to such orders as the said Court, hereby established, shall respectively make, in favour of prosecutors, as hereinbefore directed.

LXV. And we do hereby, for us, our heirs and successors, direct, authorize, and command, the Chief Justice, and other Justices of the said Court, hereby established at Madras, and all Justices of the Peace, Commissioners of Oyer and Terminer, and Gaol Delivery, now and for the time being, all Sheriffs, and other officers and ministers, and others therein concerned, respectively, by virtue of these our letters patent, to cause to be paid over to the said United Company of Merchants of England trading to the East Indies, and their successors, from time to time, all such fines, amerciaments, forfeitures, penalties, and sums of money, as shall be set or imposed upon, or be forfeited, or accrued due, by or from any person or persons, as aforesaid; and the same shall be paid or satisfied by such person or persons accordingly, or otherwise shall and may be recovered and levied, by any of the ways and means before mentioned: subject, nevertheless, to such orders as shall be made for the satisfaction of prosecutors, as hereinbefore directed.

And we do by these presents, for us, our heirs and successors, declare and grant, that such payments, so to be made, shall be as full and sufficient a discharge, to all intents and purposes, to the said Chief Justice, and other Justices of the said Supreme Court of Judicature at Madras, Justices of the Peace, Commissioners of Oyer and Terminer, and Gaol Delivery, and the said respective officers and ministers, and all and every other person and persons, as if such payments had been made to us, our heirs and successors, at the receipt of our or their Exchequer.

Provision for recovery of fines.

LXVI. And to the intent that the ends of justice may not be frustrated or delayed, by the want of a due remedy to enforce the payment of the said fines, amerciaments, forfeitures, penalties, and sums of money, we hereby will and direct, that the Commissioners of the said Court of Oyer and Terminer, and Gaol Delivery, and the Justices of the Peace in their Courts of Quarter Sessions, shall, by themselves, or by the proper officers of the said Court, in every term next after the holding of the said Courts respectively, deliver into the said Court, hereby established, upon oath, an estreat roll of all fines, amerciaments, forfeitures, penalties, and sums of money, which shall have been set, imposed, lost, or forfeited, by any person or persons whatsoever, at or by or before the said Courts, or any of them, or by or before any of the said Commissioners or Justices of the Peace, during the time of the holding any of the said Courts of Oyer and Terminer, and Gaol Delivery, or Quarter Sessions, at any period subsequent to the time when the next preceding Courts aforesaid were last holden, respectively. And that it shall and may be lawful for the said Court, hereby established, to award and issue such process against the persons liable to the payment thereof, in order to the recovery of the same, in aid and for the use of the said Company, or otherwise, according to the circumstances of the case, to discharge or mitigate the same, as our Court of Exchequer in England, or the Chancellor and Barons thereof, may or can lawfully do, upon estreats of the green-wax in England; with power also to the said Court, hereby established, by any rule or order, to cause a share or proportion of any fine imposed on any person or persons, for any delinquency or misdemeanor prosecuted to judgment, to be paid over to the prosecutor, towards defraying his expenses occasioned

thereby, as such Court shall, in its discretion, think fit or expedient.

All the King's subjects to be aiding and assisting.

LXVII. And we do further hereby strictly charge and command all governors and commanders, magistrates and ministers, civil and military, and all other our faithful and liege subjects whatsoever, in and throughout the British territories and possessions in the East Indies, and the countries, territories, districts, and places which now are, or shall be hereafter, dependent thereon, or subject or subordinate to the British Government there, that in the execution of the several powers, jurisdictions, and authorities hereby granted, made, given, or created, they be aiding, assisting, and obedient, in all things, as they will answer the contrary at their peril.

Dated the 26th Dec., 41st year of the reign.

LXVIII. In witness whereof, we have caused these our letters to be made patent. Witness ourself, at Westminster, this twenty-sixth day of December, in the forty-first year of our reign.

By Writ of Privy Seal,

WILMOT.

III.

CHARTER

ESTABLISHING THE SUPREME COURT OF JUDICATURE AT BOMBAY.

DATED THE 8TH DECEMBER 1823.

Recital of Charter, 8th January, 26th Geo. II., erecting the Mayor's Court at Bombay.

I. GEORGE THE FOURTH, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, To all to whom these presents shall come, greeting. Whereas His Majesty, King George the Second, of glorious memory, by his letters patent under the great seal of Great Britain, bearing date at Westminster the eighth day of January, in the twenty-sixth year of his reign, did, for himself, his heirs and successors, amongst other things, give and grant unto the United Company of Merchants of England trading to the East Indies, and their successors, and did ordain, establish, and appoint that there should be for ever thereafter, within the town or factory of Bombay, on the island of Bombay in the East Indies, one body politic and corporate, by the name of the Mayor and Aldermen of Bombay, and that such body politic and corporate should consist of a Mayor and nine Aldermen, to be respectively elected and appointed in manner therein mentioned, and that the said body corporate, by the name aforesaid, should have perpetual succession. And his said Majesty, King George the Second, did further grant, ordain, direct, and appoint, that the Mayor and Aldermen for the time being, of Bombay aforesaid, should for ever thereafter be, and they were thereby constituted, a Court of Record, by the name of the Mayor's Court of Bombay, with such powers, jurisdictions, and authorities, and subject to such

appeal to the Governor or President and Council of Bombay, as in the said letters patent are mentioned. And by the said Charter, the Governor or President and Council of Bombay, for the time being, are appointed Justices of the Peace, and are, in the manner therein mentioned, authorized and appointed to hold Sessions of the Peace, and of Oyer and Terminer, and Gaol Delivery, as in the said Charter are and is mentioned. And by the same Charter or letters patent, His said Majesty, King George the Second, did establish another body politic and corporate, by the name of the Mayor and Aldermen of Calcutta, at Fort William in Bengal, and did direct and appoint that the said Mayor and Aldermen of Calcutta should be a Court of Record, with such civil and criminal jurisdiction within the town and factory of Calcutta at Fort William in Bengal, or within any of the factories subject or subordinate thereto, as in the said Charter is mentioned.

Recital of the Act 37th Geo. III. c. 142.

II. And whereas, by an Act of Parliament passed in the thirty-seventh year of the reign of our late Royal Father, King George the Third, of glorious memory, entitled, "An Act for the better administration of Justice at Calcutta, Madras, and Bombay, and for preventing British subjects from being concerned in loans to the native princes in India," reciting, among other things, that the said Charter did not sufficiently provide for the due administration of Justice, in such manner as the state and condition of the Company's Settlement at Bombay required, it is amongst other things enacted, that it should be lawful for his said Majesty, King George the Third, by Charter or letters patent under the great seal of Great Britain, to erect and establish a Court of Judicature at Bombay, to consist of the Mayor and three of the Aldermen resident at the said settlement of Bombay, for the time being; which Aldermen were from time to time to be selected, in such manner as should be directed and prescribed by his said Majesty in the said Charter, together with one other person, to be named from time to time by his said Majesty, his heirs and successors, which person was to be a barrister of England or Ireland, of not less than five years' standing; and which person so appointed was to be the President of the said Court, and was to be styled the Recorder of Bombay: and that the said Court should have full power and authority to exercise and perform all civil, criminal, ecclesiastical,

and admiralty jurisdiction, and to appoint such ministerial officers as might be necessary, and to form and establish such rules of practice, and such rules for the process of the said Court, and to do all such other things, as should be necessary for the administration of justice, and the due execution of all or any of the powers which might, by the said Charter, be committed to the said Court: and that the same should also be, at all times, a Court of Oyer and Terminer, and Gaol Delivery, in and for the town and island of Bombay and the limits thereof, and the factories subordinate thereto. And by the said Act divers provisions were made, touching the extent of the said Charter, and the jurisdiction, powers, and authorities to be thereby established. And it is further, among other things, by the said Act enacted, that so much of the said Charter granted by his said Majesty, King George the Second, as conferred any civil, criminal, or ecclesiastical jurisdiction upon the Mayor's Court of Bombay, or upon the President and Council, as a Court of Appeal from the said Court, or of Oyer and Terminer, and Gaol Delivery, at the said settlement, or the subordinates thereto belonging, in case a new Charter should be granted by his said Majesty, King George the Third, in pursuance of the said Act, and should be openly published at Bombay, from and immediately after such publication should cease and determine, and be absolutely void, to all intents and purposes, and all judicial powers and authorities granted by any Act or Acts of Parliament to the said Mayor's Court, or Court of Appeal at the said Settlement, should cease and determine, and be no longer exercised by the same Courts; but that the same should and might be exercised by the Court of Judicature to be erected by virtue of the said Act, in the manner, and to the extent in the said Act before directed; but nevertheless, the said Charter should, in all other respects, continue in full force and effect, to all intents and purposes, according to the true intent and meaning thereof (except so far as it is altered or varied by the said Act), as fully and effectually as if the said Act had not been made, or such new Charter had not been granted.

Recital of the erection of the

III. And whereas his said Majesty, King George the Third, by his letters patent under the great seal of Great Britain, bearing date at Westminster the twentieth day of

Recorder's Court at Bombay.

February, in the thirty-eighth year of his reign, passed in pursuance of the said recited Act of Parliament, did, for himself, his heirs and successors, grant, direct, ordain, and appoint, that there should be within the settlement of Bombay a Court of Record, which should be called the Court of the Recorder of Bombay, and did thereby create, direct, and constitute the said Court of the Recorder of Bombay to be a Court of Record, with such civil, criminal, and ecclesiastical jurisdiction, and with such powers and authorities, to be exercised in such manner as in the said letters patent is mentioned and directed.

IV. And whereas the said letters patent have been openly published at Bombay and acted upon.

Recital of the Act 4th Geo. IV. c. 71.

V. And whereas, by an Act of Parliament passed in the fourth year of our reign, intituled, "An Act for defraying the charge of retiring pay, pensions, and other expenses of that nature, of his Majesty's forces serving in India; for establishing the pensions of the Bishop, Archdeacons, and Judges; for regulating ordinations, and for establishing a Court of Judicature at Bombay;" reciting, among other things, the letters patent granted by his said Majesty, King George the Second, bearing date the eighth day of January in the twenty-sixth year of his reign, first hereinbefore recited; and reciting that the said Charter, so far as respected the administration of justice at Bombay, had been altered and changed, by virtue of the said recited Act passed in the thirty-seventh year of the reign of his said Majesty, King George the Third, and by the said recited letters patent granted by his said Majesty, King George the Third, bearing date the twentieth day of February in the thirty-eighth year of his reign, and that the said Charter, so far as it respected the administration of justice at Fort William in Bengal, had been altered and changed, by virtue of an Act passed in the thirteenth year of the reign of his said Majesty, King George the Third, intituled, "An Act for establishing certain regulations for the better management of the affairs of the East-India Company, as well in India as in Europe," and by divers subsequent Statutes; and reciting, that it might be expedient, for the better administration of justice in the said settlement of Bombay, that a Supreme Court of Judicature should be established at

Bombay, in the same form, and with the same powers and authorities, as that now subsisting, by virtue of the several Acts before mentioned, at Fort William in Bengal: it is enacted, that it should and might be lawful for us, our heirs and successors, by Charter or letters patent under the great seal of Great Britain, to erect and establish a Supreme Court of Judicature at Bombay aforesaid, to consist of such and the like number of persons, to be named from time to time by us, our heirs and successors, with full power to exercise such civil, criminal, admiralty, and ecclesiastical jurisdiction, both as to natives and British subjects, and to be invested with such powers and authorities, privileges and immunities, for the better administration of the same, and subject to the same limitations, restrictions, and controul, within the said town and island of Bombay and the limits thereof, and the territories subordinate thereto, and within the territories which then were, or thereafter might be, subject to or dependent upon the said Government of Bombay, as the said Supreme Court of Judicature at Fort William in Bengal, by virtue of any law then in force and unrepealed, did consist of, was invested with, or subject to, within the said Fort William, or the places subject to or dependent on the Government thereof: and it is by the Act now in recital provided, that the Governor and Council at Bombay and the Governor-General at Fort William aforesaid should enjoy the same exemption, and no other, from the authority of the said Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor-General and Council at Fort William aforesaid, for the time being, from the jurisdiction of the Supreme Court of Judicature there already by law established: and it is by the same Act further enacted, that if we, our heirs or successors, should grant such Charter as aforesaid, and erect such Supreme Court of Judicature at Bombay as aforesaid, all the records, muniments, and proceedings whatsoever, of and belonging to the late Mayor's Court at Bombay, or to the late Court of Oyer and Terminer, and Gaol Delivery, which were by the said Act passed in the thirty-seventh year of his said Majesty, King George the Third, directed to be delivered over, preserved, and deposited in the new Courts erected by virtue of the said Act, and all records, muniments, and proceedings whatsoever, of and belonging to the said Court of the Recorder of Bombay, or to any

of the Courts established under and by virtue of the said Act passed in the thirty-seventh year of the reign of his said Majesty King George the Third, should, from and immediately after such Supreme Court of Judicature as we are thereby empowered to erect should be established at Bombay, be delivered over to be preserved and deposited for safe custody in the said Supreme Court of Judicature to be erected at Bombay, to which all parties concerned should and might have resort and recourse, upon application to the said Court: and it is by the same Act further enacted, that so much of the said Charter granted by his said Majesty, King George the Third, for erecting the Court of the Recorder of Bombay, as relates to the appointment of such Recorder and the erecting of such Courts of Judicature at Bombay, in case a new Charter should be granted by us, our heirs or successors, and should be openly published at Bombay, from and immediately after such publication should cease and determine, and be absolutely void, to all intents and purposes whatsoever; and all powers and authorities granted by the said Act of the thirty-seventh year of his said Majesty, King George the Third, to the said Court of the Recorder of Bombay, should cease and determine, and be no longer exercised by the said Court; but the same should and might be exercised by the Supreme Court of Judicature to be erected by virtue of the Act now in recital, in the manner, and to the extent thereinbefore directed; and that, when the said Supreme Court of Judicature which we are, by the said Act now in recital, empowered to erect, should be erected, the Court of Directors of the said United Company should, and they are thereby required to direct and cause to be paid, certain and established salaries to the Chief Justice and each of the Judges of such Supreme Court of Judicature at Bombay, as should be by the said new Charter established; that is to say, to the Chief Justice fifty-two thousand two hundred Bombay rupees by the year, and to each of the Puisne Judges of the said Supreme Court of Judicature at Bombay forty-three thousand five hundred Bombay rupees by the year, and that such salaries should be paid and payable to each and every of them, respectively, out of the territorial revenues of the said settlement of Bombay; and that the said salaries of such Chief Justice and Judges should commence and take place from and after their respectively

taking upon them the execution of their offices, as aforesaid, and that all such salaries should be in lieu of all fees of office, perquisites, emoluments, and advantages whatsoever, and that no fees of office, perquisites, emoluments, or advantages whatsoever, should be accepted, received, or taken, in any manner, or on any account or pretence whatsoever, other than such salaries or allowances as are, in and by the Act now in recital, directed to be paid, as by the said Act may more plainly and at large appear.

Establishment of a Court of Record, to be called the Supreme Court of Judicature at Bombay.

VI. Now know ye, that we, upon full consideration of the premises, and of our especial grace, certain knowledge, and mere motion, have thought fit to grant, direct, ordain, and appoint, and by these presents we do accordingly, for us, our heirs and successors, grant, direct, ordain, and appoint, that there shall be, within the settlement of Bombay, a Court of Record, which shall be called the Supreme Court of Judicature at Bombay; and we do hereby create, direct, and constitute the said Supreme Court of Judicature at Bombay to be a Court of Record.

To consist of a Chief Justice and two Puisne Judges.

VII. And we do further will, ordain, and appoint, that the said Supreme Court of Judicature at Bombay shall consist of, and be holden by and before, one principal Judge, who shall be and be called the Chief Justice of the Supreme Court of Judicature at Bombay, and two other Judges, who shall be and be called the Puisne Justices of the Supreme Court of Judicature at Bombay; which Chief Justice and Puisne Justices, shall be barristers in England or Ireland, of not less than five years' standing, to be named and appointed, from time to time, by us, our heirs, and successors, by letters patent under our and their great seal of the United Kingdom of Great Britain and Ireland: and such Chief Justice and Puisne Justices, and all and every of them, shall hold their said offices, severally, and respectively, during the pleasure of us, our heirs, and successors, and not otherwise.

Their qualification and mode of appointment.

Rank of Chief Justice.

VIII. And we do hereby give and grant to our said Chief Justice rank and precedence above and before all our subjects whomsoever, within the territories subject to the Government

of Bombay aforesaid; excepting the Governor-General for the time being of the Presidency of Fort William in Bengal, and the Governor of Bombay for the time being, and excepting all such persons as, by law and usage, take place in England before our Chief Justice of our Court of King's Bench.

Of Puisne Judges.

IX. And we do hereby also give and grant to each of our said Puisne Justices, respectively, according to their respective priority of nomination, rank and precedence above and before all our subjects whomsoever, within the territories subject to the Government of Bombay; excepting the said Governor-General for the time being of the Presidency of Fort William in Bengal, and the Governor of Fort St. George for the time being, and the Governor of Bombay for the time being, and excepting our said Chief Justice of our said Supreme Court of Judicature at Bombay, and excepting the Bishop of Calcutta for the time being, and excepting all and every the Member and Members of the Council of Bombay, and also excepting all such persons as, by law and usage, take place in England before our Justices of the Court of King's Bench.

The Court invested with a jurisdiction similar to the jurisdiction of the King's Bench in England.

X. And it is our further will and pleasure, that the said Chief Justice and the said Puisne Justices shall, severally and respectively, be, and they are, all and every of them, hereby appointed to be, Justices and Conservators of the Peace, and Coroners, within and throughout the settlement of Bombay, and the town and island of Bombay, and the limits thereof, and the factories subordinate thereto, and all the territories which now are, or hereafter may be subject to, or dependent upon, the Government of Bombay aforesaid, and to have such jurisdiction and authority as our Justices of our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England, as far as circumstances will admit.

All Acts of the Court to be decided by the majority of the Judges present.

XI. And we do further will and ordain, that all judgments, rules, orders, and acts of authority or power whatsoever, to be made or done by the said Supreme Court of Judicature at Bombay, shall be made or done by and with the concurrence of the said three Judges, or

so many or such one of them as shall be, on such occasions respectively, assembled or sitting as a Court, or of the major part of them so assembled and sitting.

The Chief Justice to have a casting voice.

XII. Provided always, that in case there shall be only two of such Justices present, and they shall be divided in their opinions, the Chief Justice, if present, shall have a double or casting voice; and if the Chief Justice shall be absent, the matter shall abide the future judgment of the Court.

This Court to have a seal, bearing His Majesty's arms, which is to be kept by the Chief Justice or by the senior.

XIII. And we do further grant, ordain, and appoint, that the said Supreme Court of Judicature at Bombay shall have and use, as occasion may require, a seal bearing a device and impression of our royal arms, within an exergue or label surrounding the same, with this inscription, "the seal of the Supreme Court at Bombay:" and we do hereby grant, ordain, and appoint, that the said seal shall be delivered to, and kept in the custody of, the said Chief Justice; and in case of vacancy of the office of Chief Justice, the same shall be delivered over to, and kept in the custody of, such person as shall then be senior Puisne Judge during such vacancy.

XIV. And we do hereby grant, ordain, and appoint, that if it shall happen that the said seal shall, by any means, come to the hands of any person or persons other than the Chief Justice, or such person as, for the time being, is hereby authorized to have the custody thereof, the said Supreme Court of Judicature at Bombay shall be, and is hereby authorized and empowered to demand, seize, and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her, or their possession, other than the person, for the time being, hereby authorized and required to have the custody thereof, and shall forthwith deliver such seal to the said Chief Justice, or to such other person as shall be, for the time being, authorized by these presents to have the custody of such seal as aforesaid.

All writs to be issued under the seal in the name of the king.

XV. And we do hereby further grant, ordain, and appoint, that all writs, summonses, precepts, rules, orders, and other mandatory process, to be used, issued, or

awarded by the said Supreme Court of Judicature at Bombay, shall run and be in the name and style of us, or of our heirs and successors, and shall be sealed with the seal of the said Supreme Court of Judicature at Bombay, and shall have and bear the attestation of the Chief Justice, or in the vacancy of the said office, of the senior of the two Puisne Justices, and shall be signed by the proper officer, whose duty it shall be to prepare and make out the same respectively.

Salaries to the Chief Justice and other Judges,

XVI. And we do further grant, ordain, appoint, and declare, that the said Chief Justice and the said Puisne Justices, so long as they shall hold their offices respectively, shall be entitled to have and receive, respectively, the salaries in and by the said recited Act of Parliament provided for that purpose; that is to say, the Chief Justice fifty-two thousand two hundred Bombay rupees by the year, and the two Puisne Judges forty-three thousand five hundred Bombay rupees by the year each; such salaries to commence and be paid and payable, at such time, and in such manner, as in the said Act of the fourth year of our reign is specified and directed.[1]

in lieu of perquisites;

XVII. And we do hereby ordain, appoint, and declare, that the said salaries shall be in lieu of all fees of office, perquisites, emoluments, and advantages whatsoever; and that no fees of office, perquisites, emoluments, or advantages whatsoever, other than and except the said salaries, shall be accepted, received, or taken by such Chief Justice or Puisne Justices, in any manner, or on any account or pretence whatsoever.

and Judges prohibited from engaging in any other office or employment, on pain of forfeiture.

XVIII. And we do further grant, appoint, and declare, that no Chief Justice, or other Justice of the said Supreme Court of Judicature at Bombay, during the time of holding and exercising the said offices, respectively, shall be capable of accepting, taking, or performing any other office, place, or employment, of any denomination whatsoever, on pain that the acceptance of any such other office, place, or employment, shall be and be deemed in law, *de facto*, an avoidance of his office of Chief Justice, or one of the

[1] The 6th Geo. IV. c. 85, regulates the payment of the Judge's salaries and pensions.

Puisne Justices of the said Supreme Court of Judicature, as the case may be, and the salary thereof shall cease, and be deemed to have ceased accordingly, from the time of such acceptance of any other office, place, or employment. Nevertheless, in case all or any of the Justices of the said Supreme Court shall be nominated or appointed by us, our heirs or successors, commissioners for the trial and adjudication of prize causes and other maritime questions, arising in India, we ordain and declare, that his or their appointment as such Justice or Justices of such Supreme Court of Judicature at Bombay shall not be vacated, nor shall his or their right to his or their salary, as such Justice or Justices of the said Supreme Court, be affected, by reason of his or their acting under any such commission, as aforesaid; nor shall he or they thereby be disabled from accepting the office of Chief Justice of the said Supreme Court of Judicature at Bombay.

XIX. And we do hereby constitute and appoint our trusty and well-beloved Sir Edward West, Knight, now Recorder of Bombay, to be the first Chief Justice, and our trusty and well-beloved Sir Ralph Rice, Knight, now Recorder of Prince of Wales Island, and Sir Charles Harcourt Chambers, Knight, to be the first Puisne Justices of our said Supreme Court of Judicature at Bombay, the said Sir Edward West, Sir Ralph Rice, and Sir Charles Harcourt Chambers, being barristers in England, of five years' standing and upwards.

Provision as to Sheriff.

XX. And we do further, for us, our heirs and successors, grant, ordain, and appoint, that the person who shall be the Sheriff of Bombay at the time of the publication of this our Charter at the Presidency of Bombay, shall be and continue the Sheriff, until another shall be duly appointed and sworn into the said office. And we do further, for us, our heirs, and successors, grant, direct, and appoint, that the Governor or President and Council of Bombay, aforesaid, for the time being, or the major part of them (whereof the said Governor or President, or in his absence, the senior of the Council then residing at Bombay, aforesaid, to be one), shall yearly, on the first Tuesday in December, or as soon after as may be, assemble themselves, and proceed to the appointment of a new Sheriff for the year ensuing, to be computed from the twentieth day of December next after such appointment; which Sheriff, when appointed,

shall, as soon as conveniently may be, and before he shall enter upon his said office, take an oath faithfully to execute his office, and the oath of allegiance, before the Governor, or in his absence the senior member of the Council there present (who are hereby respectively authorized to administer the same), and shall continue in such office during the space of one whole year, to be computed from the said twentieth day of December, and until another shall be duly appointed and sworn into the said office: and in case such Sheriff shall die in his office, or depart from the territories subject to the Presidency of Bombay, then another person shall and may, as soon as conveniently may be after the death or departure of such Sheriff, be in like manner appointed and sworn in, as aforesaid, and shall continue in his office for the remainder of the year, and until another Sheriff shall be duly appointed and sworn into the said office.

The Sheriff's duty defined.

XXI. And we do further order, direct, and appoint, that the said Sheriff and his successors shall, by themselves or their sufficient deputies, to be by them appointed and duly authorized, under their respective hands and seals, and for whom he and they shall be responsible during his or their continuance in such office, execute, and the said Sheriff and his said deputies are hereby authorized to execute, all the writs, summonses, rules, orders, warrants, commands, and process of the said Supreme Court of Judicature at Bombay, and make return of the same, together with the manner of the execution thereof, to the said Supreme Court of Judicature at Bombay, and to receive and detain in prison all such persons as shall be committed to the custody of such Sheriff by the said Supreme Court of Judicature at Bombay, or by the Chief Justice, or any of the said Puisne Justices of the said Court, respectively.

And the Court is empowered to cause writs, &c. to be directed to any other person for execution, where the Sheriff is interested.

XXII. And we do further direct, ordain, and appoint, that whenever the said Supreme Court of Judicature at Bombay shall direct or award any process against the said Sheriff, or award any process in any cause, matter, or thing, wherein the said Sheriff, on account of his being related to the parties, or any of them, or by reason of any good cause of challenge, which would be allowed against any Sheriff in that part of Great Britain called England,

cannot or ought not, by law, to execute the same, in every such case the said Supreme Court of Judicature at Bombay shall name and appoint some other fit person to execute and return the same, and the said process shall be directed to the said person so to be named for that purpose, and the cause of such special proceedings shall be suggested and entered on the records of the said Court.

Court to fix limits, beyond which the Sheriff is not bound to execute process, and provision to execute process beyond such limits.

XXIII. Provided always, and we hereby ordain and declare, that the said Supreme Court of Judicature at Bombay shall fix certain limits, beyond which the said Sheriff shall not be compelled or compellable to go in person, or by his officers or deputies, for the execution of any process of the said Court. And, upon occasions where the process of the said Court shall be to be executed in any place or places beyond the said limits so to be fixed, we grant, ordain, and direct, that the Chief Justice, or one of the said Puisne Justices, shall, by order, subject to the revision and controul of the said Court, or the said Court shall, upon motion, direct by what person or persons, and in what manner, such process shall be executed, and the terms and conditions which the party issuing the same shall enter into, in order to prevent any improper use or abuse of the process of the Court: and the said Sheriff shall, and he is hereby required to grant his special warrant or deputation to such person or persons as the said Chief Justice, or one of the Puisne Justices, or the said Court, may direct, for the execution of such process. And, in that case, we direct and declare, that the said Sheriff, his executors or administrators, shall not be responsible or liable for any act to be done in, or in anywise respecting the execution of such process, under and by virtue of such special warrant; and any person or persons being aggrieved under or by pretence of such special warrant, shall or may seek their remedy, under any security which may have been directed to be taken upon the occasion, and which the said Court, or the said Chief Justice or Puisne Justices, are hereby authorized to direct to be taken.

Court to admit advocates and attornies.

XXIV. And we do hereby further authorize and empower the said Supreme Court of Judicature at Bombay to prove, admit, and enrol, as advocates and attornies in such Court, such and so many persons as may be *bonâ*

fide practising as such in the said Court of the Recorder of Bombay and also as advocates, such and so many persons, having been admitted barristers-at-law in England or Ireland,[1] and as attornies, such and so many persons, having been admitted attornies or solicitors in one of our Courts at Westminster, as may to the said Court appear fit,[2] according to such rules and qualifications as the said Court shall for that purpose make and declare, to act as well in the character of advocates as of attornies in the said Court; which persons, so approved, admitted, and enrolled, as aforesaid, shall be, and are hereby authorized to appear and plead, and act for the suitors of the said Court, subject always to be removed by the said Court from their station therein upon reasonable cause.

XXV. And we do declare, that no other person or persons, whosoever, shall be admitted to appear and plead, or act in the said Supreme Court of Judicature at Bombay, for and on the behalf of such suitors, or any of them. Provided always, and we do hereby further order, ordain, and declare, that no person, from and after the date of these our letters patent, other than the said persons being *bonâ fide* practising as advocates or attornies in the said Court of the Recorder of Bombay, at the time of the publication of this our Charter, shall be capable of being admitted or enrolled, or of practising in the said Court, without the licence of the said United Company for that purpose first had and obtained.[3]

Appointment of clerks and other officers.

XXVI. And we do further authorize and empower the said Supreme Court of Judicature at Bombay, from time to time, as occasion shall require, to appoint so many and such clerks, registrars, proctors, and other ministerial officers, as shall be found necessary for the administration of Justice, and the due execution of all the powers and authorities which are

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[1] By the 3d & 4th Will. IV. c. 85. s. 115. the being entitled to practise as an advocate in the principal Courts of Scotland is a qualification for admission as an advocate for any Court in India.

[2] But see Act XIII. of 1845.

[3] By the 3d & 4th Will. IV. c. 85. s. 115. the licence of the Honourable Company is unnecessary.

and shall be granted and committed to the said Court, by these our letters patent.

Fees to be settled by the Court, subject to the revision of the Governor in Council.

XXVII. And we do hereby further authorize and empower the said Supreme Court of Judicature at Bombay to settle a table of fees to be allowed to such sheriff, attornies, and all other the clerks and other officers aforesaid, for all and every part of the business to be done by them, respectively; which fees, when approved by the said Governor of Bombay in Council (to whom we hereby give authority to review the same), the said sheriff, attornies, clerks, and other officers, shall and may lawfully demand and receive. And we do further authorize the said Supreme Court of Judicature at Bombay, with the like concurrence of the said Governor in Council, from time to time to vary the said table of fees, as there shall be occasion. And it is our further will and pleasure, and we do hereby require and enjoin the said Court, within one year after these our letters patent shall have been published at Bombay aforesaid, and within one month from the said settling and allowance of the said table of fees, to certify under their several hands and seals, and to transmit to the President of the Board of Commissioners for the affairs of India, to be laid before us, our heirs and successors, for our and their royal approbation and correction, a true copy of the said table of fees, together with the approbation of the said Governor in Council, and also any variation of the said table to be made as aforesaid, within one month after the same shall have been so varied. And we further direct and appoint, that the said table, and the said alteration and variations thereof (if any alteration or variation shall be made), shall be hung up in some conspicuous part of the hall or place where the said Supreme Court of Judicature at Bombay shall be publicly holden.

A true copy of the Table of Fees to be transmitted to the President of the Board of Commissioners for the affairs of India, to be laid before the king, for his approbation and correction.

The jurisdiction of the Court defined.

XXVIII. And we do further direct, ordain, and appoint, that the jurisdiction, powers, and authorities of the said Supreme Court of Judicature at Bombay shall extend to all such persons as have been heretofore described and distinguished, in our Charters of Justice for Bombay, by the appellation of British

subjects, who shall reside within any of the factories subject to or dependent upon the Government of Bombay; and that the said Court shall be competent and effectual, and shall have full power and authority to hear and determine all suits and actions whatsoever against any of our said subjects, arising in territories subject to, or dependent upon, or which hereafter shall be subject to, or dependent upon, the said Government, or within any of the dominions of the native princes of India in alliance with the said Government, or against any person or persons who, at the time when the cause of action shall have arisen, shall have been employed by, or shall have been, directly or indirectly, in the service of the said United Company, or any of the subjects of us, our heirs or successors. And the said Court, hereby established, shall have like power and authority to hear, try, and determine all and all manner of civil suits and actions, which by the authority of any Act or Acts of Parliament might have been heard, tried, or determined by the said Mayor's Court at Bombay aforesaid, or which may now be heard, tried, or determined by the said Court of the Recorder of Bombay; and all powers, authorities, and jurisdictions, of what kind or nature soever, which by any Act or Acts of Parliament may be, or are directed to be, exercised by the said Mayor's Court, or by the said Court of the Recorder of Bombay, shall and may be as fully and effectually exercised by the said Supreme Court of Judicature at Bombay, as the same might have been exercised and enjoyed by the said Mayor's Court, or by the said Court of the Recorder at Bombay.

As to the inhabitants of Bombay.

XXIX. And we do hereby further direct and ordain, that the said Supreme Court of Judicature at Bombay shall have full power to hear and determine all suits and actions that may be brought against the inhabitants of Bombay. Yet, nevertheless, in the cases of Mahomedans or Gentoos, their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of the Mahomedans, by the laws and usages of the Mahomedans, and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined by, if the suit had been brought and the action commenced in a Native Court; and where one of the parties shall be a Mahomedan or Gentoo,

by the laws and usages of the defendant. And in all suits so to be determined by the laws and usages of the said natives, the said Courts shall make such rules and orders for the conduct of the same, and frame such process for the execution of their judgments, sentences, or decrees, as shall be most consonant to the religion and manners of the said natives, and to the said laws and usages respectively, and the easy attainment of the ends of justice. And in all cases, such means shall be adopted for compelling the appearance of witnesses, and taking their examination, as shall be consistent with the said laws and usages, so that all suits may be conducted with as much ease, and at as little expense, as shall be consistent with the attainment of substantial justice.

Certain persons not to be arrested.

XXX. Provided always, and we do hereby declare, that nothing in this Charter shall extend, or be construed to extend, to subject the person of the Governor-General of Fort William, or the person of the Governor of Fort St. George, or the person of the Governor of Bombay, or any of the Council of the said settlement of Bombay, or the person of the Chief Justice or any of the Justices respectively, for the time being, to be arrested or imprisoned, in any suit, action, or proceeding in the said Court; nor shall it be competent for the said Court to hear or determine, or to entertain or exercise jurisdiction in any suit or action against the Governor-General of Fort William, or the Governor of Fort St. George, or the Governor of Bombay, or any of the Council of the said settlement of Bombay, for or on account of any act, or order, or any other act, matter, or thing whatsoever committed, ordered, or done by them, in their public capacity, or acting as Governor-General of Fort William, or Governor of Fort St. George, or Governor and Council of Bombay; nor shall the said Court have or exercise any jurisdiction in any matter concerning the revenue under the management of the said Governor and Council of Bombay, respectively, either within or beyond the limits of the said town, or the forts or factories subordinate thereto, or concerning any act done according to the usage and practice of the country, or the regulations of the Governor and Council of Bombay, aforesaid. And we further will and declare, that no person shall

Certain cases in which the Court shall not have any jurisdiction.

be subject to the jurisdiction of the said Court, for or by reason of being a landholder, landowner, or farmer of land, or of land-rent, or for receiving a pension or payment in lieu of any title to or ancient possession of land or land-rent, or for receiving any compensation or share of profits for collecting rents payable to the public, out of such lands or districts as are actually farmed by himself, or those who are his under-tenants, by virtue of the farm, or for exercising within the said lands or farms any ordinary or local authority commonly annexed to the possession or farm thereof, or for or by reason of his becoming security for the payment of the rents reserved, or otherwise payable out of any lands or farms, or farms of lands, within the dominions subject to the said Government of Bombay. And no person, for or by reason of his being employed by the said Company, or the Governor and Council of Bombay, or by any person deriving authority under them, or for or on account of his being employed by a native, or the descendant of a native of Great Britain, shall become subject to the jurisdiction of the said Court, in any matter of inheritance or succession to goods or lands, or in any matter of dealing or contract between party and party, except in actions for wrongs or trespasses only. And provided also, and we do further declare, that no action for wrong or injury shall lie against any person whomsoever, exercising a judicial office in any country Court, for any judgment, decree, or order of such Court, or against any person for any act done by or in virtue of the order of such Court. And in case any information is intended to be brought against any such person or officer, the same shall be brought and proceeded in, in the same manner, and to all intents and purposes in the same form, and to the same effect, as such informations are directed to be proceeded in before the Supreme Court of Judicature at Fort William in Bengal, by an Act passed in the twenty-first year of the reign of His Majesty, King George the Third, entitled "An Act to explain and amend so much of an Act made in the thirteenth year of the reign of his present Majesty, entitled, 'An Act for establishing certain Regulations for the better management of the affairs of the East-India Company, as well in India as in Europe,' as relates to the administration of justice in Bengal, and for the relief of certain persons imprisoned at Calcutta in Bengal, under a judgment of the Supreme Court of Judicature, and also for indemni-

fying the Governor-General and Council of Bengal, and all officers who have acted under their orders or authority, in the undue resistance made to the process of the Supreme Court."

The method of commencing and prosecuting civil suits.

XXXI. And to the end that justice may be the more speedily and effectually administered in the said Supreme Court of Judicature at Bombay, our will and pleasure is, and we do hereby further, for us, our heirs and successors, grant, ordain, and appoint, that upon any cause of action upon which the said Court can hold plea, it shall be lawful and competent for any person whomsoever, by himself or his lawful attorney, duly admitted and inrolled in and by the said Court, in the manner herein provided in that behalf, to prefer to the said Court, and file therein of record, a plaint or bill in writing, containing the cause of action or complaint, whereupon the said Court shall, and is hereby authorized to award and issue a summons, or precept in nature of a summons, in writing, to be prepared in manner above mentioned, directed to the said Sheriff, and containing a short notice of the cause of action set forth in the said plaint, and commanding the said Sheriff to summon the person against whom the said plaint shall have been filed, to appear, at some certain time and place therein to be specified, to answer the said plaint, which precept, and the execution thereof, the said Sheriff shall duly return to the said Court; and the person or persons so summoned shall accordingly appear, and may plead such matter in abatement, bar, or other avoidance of the said plaint, or otherwise, as he, she, or they shall be advised; and after such appearance, the said Court shall proceed from time to time, giving reasonable days to the parties to hear their respective allegations, as justice may require, and examine the truth thereof, upon the oath or oaths of such competent and credible witnesses as they shall produce respectively. To which end, we hereby authorize and empower the said Court, at the request of either of the said parties, to award and issue a summons, or precept in the nature of a summons, to be prepared in manner before mentioned, and directed to every one of such witnesses, commanding him or her to appear, at a time and place to be specified in such summons, to depose his or her knowledge touching the suit so depending between the parties, naming them, and specifying

Witnesses to be summoned.

at whose request such summons shall have issued; and upon the appearance of the said witnesses, or any of them, the said Court may, and is hereby required to order and award to them, and each of them, such reasonable sum of money, for his, her, or their expenses, as the said Court shall think fit, whether such witnesses shall be examined or not, the same to be paid forthwith by the party at whose request the said summons shall have issued; and if the said sum of money, so ordered and awarded, shall not be forthwith paid or secured to such witnesses, to the satisfaction of the said Court, the party to whom it shall belong to pay the same shall not only lose the benefit of the testimony of such witnesses, but shall be compelled to pay him or her the money so ordered and awarded, by such ways and process as are herein provided for levying and enforcing the payment and satisfaction of money recovered by judgments of the said Court. And the said Court is hereby authorized and empowered to administer to such witnesses, and others whom they may see occasion to examine, proper oaths and affirmations[1], that is to say; to such persons as profess the Christian religion, an oath or affirmation according to the form used in England in like cases, and to others, an oath or oaths, or affirmations, in such manner and form as the said Supreme Court of Judicature at Bombay shall esteem most binding upon their consciences respectively.[2] And the said Court is hereby authorized and required to cause such witnesses, so sworn or affirming, to be examined touching the matters in question: and in all cases where, by reason of the amount in value of the matter in dispute, an appeal is allowed, by these our letters patent, from the judgment or determination of the said Court (but not in any cases of less value), the said Supreme Court of Judicature at Bombay is hereby authorized and required to reduce the depositions of the witnesses so to be examined, or cause the same to be reduced into writing, and subscribed by the several witnesses with their names or other mark, and to file the same of record. And in case any person, so summoned, shall refuse, or wilfully neglect to appear and be sworn, or to affirm, and be examined,

And are to be sworn in such way as may be most binding on their consciences.

Witnesses in contempt to be fined or imprisoned.

[1] See 9th Geo. IV. c. 74. s. 36.

[2] Affirmations are now substituted for oaths in the case of Natives. See Act V. of 1840.

and subscribe his or her deposition, as the said Court shall appoint, the said Court is hereby empowered to punish such person so refusing, or wilfully neglecting, as for a contempt, by fine or by imprisonment, or other corporeal punishment not affecting life or limb.

Proviso that native witnesses are not to be called upon, otherwise than they would be called upon by a native Court.

[1] XXXII. Provided always, that no person, being a native of India, shall be compelled or compellable, or enforced to appear in the said Court, by virtue of any summons to appear as a witness, or to appear in any other manner, or to give testimony in any other form, than such person could or might have been called upon to appear and give testimony before any native Court, according to the laws and usages of the natives; and no such native shall be liable to any punishment, for any contempt in not appearing or submitting to be sworn and examined, in any other form or manner than such person could or might have been called upon to appear and give testimony before any such native Court.

The Court to give judgment according to justice and right.

XXXIII. And we do further give to the said Supreme Court of Judicature at Bombay full power and authority, upon examining and considering the several allegations of the said parties to such suit, or of the complainant alone, in case the defendant should make default after appearance, or say nothing, or confess the plaint; and on examining and considering the depositions of the witnesses to give judgment and sentence according to justice and right, and also to award and order such costs to be paid by any or either of the parties to the other or others, as the Court shall think just.

And to award execution against the goods, lands, or person of the debtor.

XXXIV. And we do further authorize and empower the said Supreme Court of Judicature at Bombay to award and issue a writ or writs, or other process of execution, to be prepared in manner before mentioned, and directed to the said Sheriff for the time being, commanding him to seize and deliver the possession of houses, lands, or other things recovered in and by such judgment, or to levy any sum of money which shall be so recovered, or any costs which shall be so

[1] This and the next clause are omitted in the Bengal Charter.

awarded, as the case may require, by seizing and selling so much of the houses, lands, debts, or other effects, real and personal, of the party or parties against whom such writs shall be awarded, as will be sufficient to answer and satisfy the said judgment, or to take and imprison the body or bodies of such party or parties, until he, she, or they shall make such satisfaction, or to do both, as the case may require.

XXXV. And we direct and appoint, that the several debts to be seized as aforesaid, shall, from the time the same shall be extended and returned into the said Supreme Court, be paid and payable in such manner and form as the said Court shall appoint, and no other; and such payment, and no other, shall from thenceforth be an absolute and effective discharge for the said debts, and every of them, respectively.

And to make interlocutory orders.

XXXVI. And we do hereby further authorize and empower the said Supreme Court to make such further and other interlocutory rules and orders, as the justice of the proceeding may seem to require. And in case the party so summoned, as aforesaid, shall not appear upon the return of such summons or precept as aforesaid, according to the exigence thereof, or if the cause of action, as contained in such plaint as aforesaid, shall exceed the value of one hundred and fifty Bombay Rupees, or shall be in the nature of an enormous personal wrong, and in either or any of the said cases, the said Court, or the Chief Justice, or any of the Justices of the said Court, shall be satisfied by affidavit or affirmation to be filed of record, that the case is such as to require security, then, after return of such summons, or in lieu thereof, the said Court, or the Chief Justice, or any of the Justices of the said Court (the orders and acts of the said Chief Justice and Justices, or any of them, in this respect, out of Court, to be subject to the review and control of the Court), is hereby authorized and empowered to award and issue a writ or warrant, directed to the said Sheriff, commanding him to arrest and seize the body of such defendant, and to have the same, at a time and place in the said writ to be specified, before the said Court, to answer the said plaint. And the said Court may, in and by the said writ or warrant, authorize the said Sheriff to deliver the body of such defendant, so arrested, to sufficient bail, that such defendant shall appear at a time and place mentioned in such writ or warrant, and in

And in certain cases to hold to bail.

all things perform and fulfil the exigence thereof; and upon the appearance of such defendant in and before the said Court, we do hereby authorize and empower the said Court to commit him to prison, to the said Sheriff, unless and until he shall give bail, to the satisfaction of the said Court, for paying the debt, damages, and costs, which shall be recovered against him in such action, or for rendering himself to prison; and in default thereof, that the bail will pay such debt, damages, and costs for him; which bail we hereby empower the said Court to take, and thereupon deliver the body of the said defendant to bail. And if the said Sheriff shall make return upon either of the said writs of summons or capias, that the defendant is not to be found within the jurisdiction of the said Court, and the plaintiff, or some other person, shall by affidavit, or in the case of a Quaker by affirmation, in writing or otherwise, to the satisfaction of the said Court, make proof, verifying the plaintiff's demand, we do hereby grant, ordain, and appoint, that the said Court shall and may award and issue a writ, in the nature of a writ of sequestration, to be prepared in manner above mentioned, and directed to the said Sheriff, commanding him to seize and sequester the houses, lands, goods, effects, and debts of such defendant, to such value as the said Court shall think reasonable and adequate to the said cause of action, so verified as aforesaid, and the same to detain, till such defendant shall appear and abide such order of the said Court as if he had appeared on the former process. And the said Court shall, and is hereby authorized and empowered, according to their discretion, either to cause the said goods to be detained in specie, or to be sold, and to give day to such defendant, by proclamation in open Court, from time to time, not exceeding two years in the whole; and if such defendant shall not appear on the last day, which the said Court in their discretion shall think proper to give, it shall be lawful, and the said Court is hereby authorized to proceed *ex-parte*, to hear, examine, and determine the said plaint and suit, or cause of action, and to give such judgment therein, and award and order such costs as aforesaid. And if judgment shall, in such case, pass for the plaintiff, the said Court is hereby authorized and empowered to award and issue a writ to the said

Effects of defendant not appearing, or not to be found, may be sequestered;

and the goods sold to pay the debt when ad-

judged, which after a time the Court may do *ex-parte*.

Sheriff, to be prepared in manner above mentioned, commanding him to sell the said houses, lands, goods, effects, and debts, so seized and sequestered, and to make satisfaction out of the produce thereof to the plaintiff, for the duty or sum so recovered, and his costs, and to return the overplus, if any there be, after satisfying the said judgment and costs, and the expenses of the said sequestration, to such person in whose possession the said effects were seized, or otherwise to reserve the same for the use of the said defendant, as occasion shall require. And if such effects shall not be sufficient to produce the sum so to be recovered, and the said costs, the said Court is hereby further empowered to award and issue such process of execution for the deficiency, as is herein provided for levying money recovered by judgment and costs; and if judgment shall, in such last-mentioned case, pass for the defendant, the said Court is authorized and empowered to award and order the costs of the said suit, and the expense of the said sequestration, and all damages occasioned thereby, to be paid by the said plaintiff to the said defendant or his attorney, or the person in whose possession the said effects were seized, the same to be levied by such process as is hereinbefore provided for levying costs; and the said debts, from the time of their being so seized and extended, and returned into Court, shall be payable in such a manner as the said Court shall direct, and no other.

And if insufficient, further execution may be awarded.

Court empowered to frame rules and process.

XXXVII. And we do hereby further will, direct, and ordain, that the said Court, hereby established, shall frame such process, and make such rules and orders for the execution of the same, in all suits, civil and criminal, to be commenced, sued, or prosecuted within their jurisdiction, as shall be necessary for the due execution of all or any of the powers hereby committed thereto, with an especial attention to the religion, manners, and usages of the native inhabitants living within its jurisdiction, and accommodating the same to their religion, manners, and usages, and to the circumstances of the country, so far as the same can consist with the due execution of law and the attainment of substantial justice.

Forms of process, and

XXXVIII. Provided always, and we do hereby further ordain and direct, that all forms of process, and rules

rules & orders, to be transmitted to the President of the Board of Commissioners for the affairs of India, to be laid before the King for his approbation and correction.

and orders for the execution thereof, which shall be framed by the said Court, shall be transmitted from time to time, by the first convenient opportunity after the same shall be so framed, to the President of the Board of Commissioners for the affairs of India, to be laid before us, our heirs or successors, for our and their royal approbation, correction, or refusal.

XXXIX. And we ordain and direct, that such process shall be used, and such rules shall be observed, until the same shall be repealed or varied; and, in the last case, with such variation as shall be made therein.

Provision for the prosecution of suits against the East-India Company.

The Governor and Council of Bombay are to appoint an Attorney for the Company.

XL. And we do hereby, for us, our heirs and successors, further grant, ordain, and appoint, that the said Governor and Council of Bombay, and their successors, shall and may, from time to time, by their sufficient warrant, to be filed of record in the said Supreme Court of Judicature of Bombay, name and appoint some sufficient person, resident in the said town of Bombay, to be the Attorney of the said United Company, who shall remain and act as Attorney to the said Company, so long as he shall reside in the said town, or until some other fit person, there resident, shall be appointed in his place, in manner above mentioned. And if any such plaint, as aforesaid, shall be filed in the said Court against the said Company, the said Court may, and is hereby empowered to award and issue such summons or precept, as aforesaid, directed to the said Sheriff, commanding him to summons the said Company by their said Attorney, to appear at the time and place therein to be specified, to answer to the said plaint; and the Sheriff shall serve the same upon the said Attorney, and the said Attorney shall thereupon appear for the said Company; and if the said Company shall not appear in manner aforesaid, upon the return of the said writ, the said Court may and is hereby authorized, upon such default, to award and issue a writ, to be prepared in manner above mentioned, and directed to the said Sheriff, commanding him to seize and sequester such and so much of the estate and effects of the said Company, as, upon the circumstances, the said Court shall think fit, to compel the appearance of the

said Company, at the time and place which shall be specified, for that purpose, in such writ of sequestration. And for default of the appearance, upon the return of such last-mentioned writ, the said Court may, and is hereby empowered to issue such other writ or writs of sequestration, until an appearance of the said Company shall be duly entered and recorded in the said Court; and after such appearance, the said Court shall and may proceed to hear and examine, try and determine, the said action and suit, in manner before-mentioned. And if judgment shall be given in such action or suit against the said Company, the said Court may, and is hereby empowered to award and order reasonable costs to be paid by the said Company, and to cause the debt or damages and costs, so awarded, to be raised and levied out of the estates, goods, and chattels of the said Company, in such manner as is herein-before provided, for execution to be had in other actions and suits. And if the said Governor and Council shall refuse or neglect, at any time, to make and appoint such Attorney of record, the said Court is hereby empowered and authorized to name an Attorney for the said Company upon record, upon whom process shall, in like manner, be served.

In default whereof the Court may name one.

The Company may sue in the Court as any other persons.

And the said Company may also sue in the said Supreme Court of Judicature at Bombay, in the same manner, and to the same effect, as any other persons within the jurisdiction thereof can or may do; and if judgment shall be given against the said Company, the said Court of Judicature may order reasonable costs to be paid by them to the defendant, and to be raised and levied out of their lands, houses, debts, estates, goods, and chattels, in such manner as is herein provided for execution of judgment on other occasions. And if the said Company, after four sequestrations, and after the expiration of two years from the service of the summons above-mentioned, shall not appear, then the said Court may and is hereby required, if the plaintiff or plaintiffs shall by affidavit (or being a Quaker, by affirmation, in writing or otherwise), to the satisfaction of the said Court, make proof, verifying his, her, or their demand, proceed to hear, examine, try, and determine the said plaint and cause, and to give such judgment therein, and award such costs as aforesaid; and in case judgment shall pass for the plaintiff, the

said Court is hereby authorized and empowered to award and issue a writ to the said Sheriff, to be prepared in manner before-mentioned, commanding him to sell the goods and effects so seized and sequestered, and to make satisfaction, out of the produce thereof, to the plaintiff or plaintiffs, for the debt so recovered, and his, her, or their costs, and to return the overplus (if any there be) after satisfying the said judgment, and costs and expenses of the said sequestration, to such person or persons in whose possession the said effects were so seized, to and for the use of the said United Company; and if such effects shall not be sufficient to produce the sum so to be recovered, and the said costs, the said Court is further empowered to award and issue such process of execution for the deficiency, as is herein provided for levying money recovered by judgment and costs. And if judgment shall, in any case, pass for the said Company, the said Court is hereby authorized and empowered to award and order the costs of the said suit, and the expenses of the said sequestration, and all the damages occasioned thereby (the same being first taxed, ascertained, and attested, by the proper officers), to be paid by the said plaintiff or plaintiffs to the person or persons in whose possession the said effects were seized, to and for the use of the said Company, and the same shall be levied by such process as is hereinbefore provided for levying costs.

An equitable jurisdiction is given to this Court similar to that of the Court of Chancery.

XLI. And it is our further will and pleasure, and we do hereby, for us, our heirs and successors, grant, ordain, and establish, that the said Supreme Court of Judicature at Bombay shall also be a Court of Equity, and have equitable jurisdiction over the person or persons hereinbefore described and specified or limited, for its ordinary civil jurisdiction, as aforesaid, subject to the restrictions and exceptions hereinbefore, in that behalf, expressed or contained, and not otherwise; and shall and may have full power and authority to administer justice in a summary manner, according or as near as may be to the rules and proceedings of our High Court of Chancery in Great Britain; and, upon a bill filed, to issue subpœnas and other process, under the seal of the said Court, to compel the appearance and answer upon oath of the parties therein complained against, and obedience to the decrees and orders of the said Court of Equity, in such

manner and form, and to such effect, as the High Chancellor of Great Britain doth, or lawfully may, under our great seal of our United Kingdom, or as near the same as the circumstances and condition of the places and persons under their jurisdiction, and the laws, manners, customs, and usages of the native inhabitants will admit.

With similar authority over the persons and estates of infants and lunatics.

XLII. And we do hereby authorize the said Supreme Court of Judicature of Bombay to appoint guardians and keepers for infants and their estates, according to the order and course observed in that part of Great Britain called England; and also guardians and keepers of the persons and estates of natural fools, and of such as are or shall be deprived of their understanding or reason by the act of God, so as to be unable to govern themselves and their estates, which we hereby authorize and empower the Supreme Court of Judicature at Bombay to inquire, hear, and determine, by inspection of the person, or by such other ways and means, by which the truth may be best discovered and known.

Also criminal jurisdiction, as a Court of Oyer and Terminer.

XLIII. And it is our further will and pleasure, and we do hereby grant, order, ordain, and appoint, that the said Supreme Court of Judicature at Bombay shall also be a Court of Oyer and Terminer, and Gaol Delivery, in and for the town and island of Bombay and the limits thereof, and the factories subordinate thereto, and shall have and be invested with the like power and authority as Commissioners or Justices of Oyer and Terminer, and Gaol Delivery, have, or may exercise, in that part of Great Britain called England, to inquire, by the oaths of good and sufficient men, of all treasons, murders, and other felonies, forgeries, perjuries, trespasses, and other crimes and misdemeanors, heretofore had, made, done, or committed; or which shall hereafter be had, done, or committed, within the said town and island of Bombay, or the limits thereof, or the factories subordinate thereto[1]; and, for that purpose, to issue their warrant or precept, to be prepared in manner above-mentioned, and directed to the said Sheriff, commanding him to summon a convenient number, therein to be specified, of the principal inhabitants

[1] 9th Geo. IV. c. 74. ss. 56. 127.

resident in the said town or island of Bombay, being persons so heretofore described and distinguished as British subjects of us, our heirs and successors, as aforesaid,[1] to attend and serve, at a time and place therein also to be specified, as a grand jury or inquest, for us, our heirs and successors, and present to the said Court such crimes and offences as shall come to their knowledge, and the said crimes and offences to hear and determine, by the oaths of other good and sufficient men, being persons so heretofore described and dintinguished as British subjects of us, our heirs and successors, and resident in the said town or island of Bombay, or the limits thereof, or the factories subordinate thereto; and, for that purpose, to issue a summons or precept, prepared in such manner as is hereinbefore mentioned, and directed to the said Sheriff, commanding him to summon a convenient number, to be therein specified, of such persons, so heretofore described and distinguished as British subjects, as aforesaid, to try the said indictment or inquest. And if any person or persons to be summoned upon such Grand or Petit Jury, as aforesaid, shall refuse or neglect to attend, according to such summons, and be sworn upon inquest, we do hereby further empower the said Supreme Court of Judicature at Bombay to punish the said contempt, by fine, or by imprisonment for a reasonable time, to be limited, or by both. And we do further empower the said Supreme Court of Judicature at Bombay, in like manner and under like penalties, to cause all such witnesses as justice shall require to be summoned, and to administer to them, and each of them, the proper oaths, that is to say, to such as profess the Christian religion, an oath in such manner and form as the same would have been administered in England, and to others, such oaths, and in such manner, as the said Court shall esteem to be most binding upon their consciences[2]; and to proceed to hear, examine, try, and determine the said indictments and offences, and to give judgment thereupon, and to award execution thereof, and in all respects administer criminal justice, in such or the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of, as our Courts of Oyer and Terminer, and Gaol Delivery, do or may, in that part of Great Britain

[1] 7th Geo. IV. c. 37. s. 1.; and see 2d and 3d Will. IV. c. 117. s. 2. [2] See Act V. of 1840.

called England, due attention being had to the religion, manners, and usages of the native inhabitants.

Criminal jurisdiction, as to offences committed by any of the King's subjects in the territories of Native Princes.

XLIV. And we do further authorize and empower the said Supreme Court of Judicature at Bombay, in like manner, to inquire, hear, and determine, and to award judgment and execution of, upon, and against all treasons, murders, felonies, forgeries, perjuries, crimes, extortions, misdemeanors, trespasses, wrongs, and oppressions, had, done, or committed, or which shall hereafter be had, done, or committed, by any of our subjects, in any of the territories subject to, or dependent upon, the Government of Bombay, or within any of the territories which now are, or hereafter may be, subject to, or dependent upon, the said Goverment, or within any of the dominions of the Native Princes of India in alliance with the said Government; and for that purpose to award and issue a writ or writs to the said Sheriff, prepared in manner before-mentioned, commanding him to arrest and seize the body or bodies of such offender or offenders, and bring him or them to Bombay aforesaid, and him or them to keep, until he or they shall be delivered by due course of law, and to do all other acts which shall be necessary, as well for the due administration of criminal justice, as for any other purpose or purposes, in as ample manner and form as might have been done by the Court of Oyer and Terminer at Bombay, as established by the said Charter of justice, so granted, as aforesaid, by his said Majesty, King George the Second, or by the said Charter so granted by his said Majesty, King George the Third, as hereinbefore mentioned, or by virtue or under the authority of any Act or Acts of Parliament relative thereto, and in such manner and form, as nearly as the circumstances and condition of the case will admit of, as our Courts of Oyer and Terminer, and Gaol Delivery, may do in that part of Great Britain called England. And we further ordain and establish, that in any case it shall not be lawful for any offender to object to the locality of the jurisdiction of the Court, or of the Grand or Petit Jury, summoned as hereby directed; but he shall be indicted, arraigned, tried, convicted, and punished, or acquitted or demeaned, in all respects, as if the crime had been com-

mitted within the town or island of Bombay, or the limits thereof, or of the factories subordinate thereto.

Exception of the Governor and Council of Bombay, in certain cases, from the criminal jurisdiction.

XLV. Provided always, and we do hereby declare, that the said Court shall not be competent to hear, try, and determine, any indictment or information against the Governor-General of Fort William in Bengal, or the Governor of Fort St. George, or the Governor or any of the Council of Bombay, not being for treason or felony, which any such Governor-General, or Governor, or any of such Council, shall or may be charged with having committed, within the jurisdiction of the same.

The Court of Oyer and Terminer may reprieve execution of any capital sentence until the King's pleasure is known.

XLVI. And whereas cases may arise, wherein it may be proper to remit the general severity of the law[1], we do hereby authorize and empower the said Court of Oyer and Terminer, and Gaol Delivery, to reprieve and suspend the execution of any capital sentence, wherein there shall appear, in the judgment of the said Court, a proper occasion for mercy, until our pleasure shall be known; and the said Court shall, in such case, transmit to us, under the seal of the said Court, a state of the case, and of the evidence, and of the reasons for recommending the criminal to our mercy, or for such reprieve or suspension, as the case may be. In the meantime the said Court shall cause such offender to be kept in strict custody, or deliver him or her out to sufficient bail or mainprize, as the circumstances shall seem to require.

The Court to exercise ecclesiastical jurisdiction.

XLVII. And it is our further will and pleasure, and we do hereby, for us, our heirs and successors, grant, ordain, establish, and appoint, that the said Supreme Court of Judicature at Bombay shall be a Court of ecclesiastical jurisdiction, and shall have full power and authority to administer and execute, within and throughout the town and island of

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[1] By the 9th Geo. IV. c. 74. s. 29., the Court can order capital offenders to be transported for life instead of left for execution. See also Act VII. of 1837, and Act XXXI. of 1838.

Bombay, and the limits thereof, and the factories subordinate thereto, and all the territories which now are, or hereafter may be, subject to or dependent upon the said Government, and towards and upon all persons so described and distinguished by the appellation of British subjects, as aforesaid, there residing, the ecclesiastical law, as the same is now used and exercised in the diocese of London in Great Britain, so far as the circumstances and occasion of the said town, island, territories, and people shall admit or require. And, to that purpose, we give and grant to the said Supreme Court of Judicature at Bombay full power and authority to take cognizance of, and proceed in all causes, suits, and business, belonging and appertaining to the Ecclesiastical Court, before the said Supreme Court of Judicature at Bombay, in whatsoever manner to be moved, as well at the instance or promotion of parties as of office, mere or mixed, against any of the said subjects residing in the said town, island, territories, or districts, and which, by the law and custom of the said diocese of London, are of ecclesiastical cognizance; and the said causes, suits, and business, with their incidents, emergents, and dependents, and whatsoever is thereto annexed and therewith connected, to hear, dispatch, discuss, determine; and also to grant probates, under the seal of the said Supreme Court of Judicature of Bombay, of the last wills and testaments of all or any of the said subjects of us, our heirs and successors, dying and leaving personal effects, within the said town, islands, territories, or districts, respectively, and of all persons who shall die or have effects within the places aforesaid; and to commit letters of administration, under the seal of the said Court, of the goods, chattels, credits, and all other effects whatsoever, of the persons aforesaid, who shall die intestate,[1] or who shall not have named an executor resident within the said town, islands, territories, or districts, or where the executor, being duly cited according to the form generally used for that purpose in the said diocese of London, shall not appear and sue forth such probate, annexing the will to the said letters of administration, when such person shall have left a will without

And grant probates of wills and letters of administration of persons dying or having effects within its jurisdiction.

[1] See 4th Geo. IV. c. 81. s. 51. 6th Geo. IV. c. 61.

naming any executor or any person for executor, who shall then be alive, and resident within the said town, island, territories, or districts, and who being duly cited thereunto, will appear and sue forth a probate thereof; and to sequester the goods and chattels, credits, and other effects whatsoever, of such persons so dying, in cases allowed by law, as the same is and may now be used in the said diocese of London, and to demand, require, take, hear, examine, and allow, and if occasion require, to disallow and reject the amount of them, in such manner and form as is now used, or may be used, in the said diocese of London, and to do all other things whatsoever, needful and necessary in that behalf.

XLVIII. Provided always, and we do hereby authorize and require the said Supreme Court of Judicature at Bombay, in such cases as aforesaid, where letters of administration shall be committed with the will annexed, for want of an executor appearing in due time to sue forth the probate, to reserve in such letters of administration full power and authority to revoke the same, and to grant probate of the said will to such executor, whenever he shall appear and sue forth the same.

XLIX. And we do hereby further authorize and require the said Supreme Court of Judicature at Bombay to grant and commit such letters of administration, according to the course now used, or which lawfully may be used, in the said diocese of London, to the lawful next of kin of such persons so dying as aforesaid. And in case no such person shall then be residing within the jurisdiction of the said Court, or being duly cited, shall not appear and pay the same, to the principal creditor of such person, or such other creditor as shall be willing or desirous to obtain the same; and for want of any creditor appearing, then to the Registrar of the said Court, or such other persons, in such manner, and subject to such power of revocation as, in and by an Act of Parliament of the thirty-ninth and fortieth years of his said Majesty, King George the Third, intitled "An Act for establishing further regulations for the government of the British territories in India, and the better administration of justice within the same," and an Act of Parliament of the fifty-fifth year of his said Majesty, King George the Third, intitled "An Act to amend so much of an Act of the

thirty-third year of his present Majesty, as relates to the fixing the limits of the towns of Calcutta, Madras, and Bombay, and also so much of an Act of the thirty-ninth and fortieth year of his present Majesty, as relates to granting letters of administration to the effects of persons dying intestate, within the several Presidencies in the East Indies, to the Registrar of the Ecclesiastical Courts, and to enable the Governor in Council of the said Presidencies to remove persons not being British subjects, and to make provision for the Judges in the East Indies, in certain cases," is provided.

Administrators are to give security by bond, for duly administering effects, as in the diocese of London.

L. And we do hereby further enjoin and require, that every person to whom such letters of administration shall be committed, other than the Registrar of the said Court, taking administration under the authority of the said Act of the thirty-ninth and fortieth year of the reign of his Majesty, King George the Third, shall, before the granting thereof, give sufficient security, by bond, to the Registrar[1] or Chief Clerk of the said Supreme Court of Judicature at Bombay, for the payment of a competent sum of money, with two or more able sureties (respect being had in the sum therein to be contained, and in the ability of the sureties, to the value of the estate, credits, and effects of the deceased), which bond shall be deposited in the said Court among the Records thereof, and there safely kept, and a copy thereof shall be also recorded among the proceedings of the said Court. And the condition of the said bond shall be to the following effect: "That if the above-bounden administrator of the goods and effects of the deceased do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, credits, and effects of the said deceased, which have or shall come to the hands, possession, or knowledge of him, the said administrator, or the hands or possession of any other person or persons for him, and the same so made do exhibit, or cause to be exhibited, into the Supreme Court of Judicature at Bombay, at or before a day therein to be specified, and the same goods, chattels, credits, and effects, and all other the goods,

[1] Instead of to the Junior Judge, as provided by the Bengal Charter. Sec. 23. *supra* p. 575.

chattels, credits, and effects of the deceased at the time of his death, or which at any time afterwards shall come to the hands or possession of such administrator, or to the hands or possession of any other person or persons for him, shall well and truly administer, according to law; and further shall make, or cause to be made, a true and just account of his said administration, at or before a time therein to be specified, and all the rest and residue of the said goods, chattels, credits, and effects, which shall be found remaining upon the said administration account, the same being first examined and allowed of by the same Supreme Court of Judicature at Bombay, shall deliver and pay unto such person or persons, respectively, as shall be lawfully entitled to such residue, then this obligation to be void and of none effect, or else to remain in full force and virtue."

In what cases the bond may be put in suit.

LI. And in case it shall be necessary to put the said bond in suit, for the sake of obtaining the effect thereof, for the benefit of any person or persons who shall appear to the said Supreme Court to be interested therein, such person or persons, from time to time, paying all such costs as shall arise from the said suit, or any part thereof, such person or persons shall, by order of the said Court, be allowed to sue the same in the name of the said obligee, and the said bond shall not be sued in any other manner. And we do hereby authorize and empower the said Supreme Court of Judicature at Bombay to order that the said bond shall be put in suit, in the name of the said Registrar or Chief Clerk, or his executors or administrators, whom we also authorize the said Court to name and appoint for that special purpose.

The Court may grant administration of effects at the settlement, though left by persons who died out of the settlement.

LII. And whereas many persons possessed of, or entitled to money or effects, within the limits of the jurisdiction hereby given to the said Supreme Court of Judicature at Bombay, may die in other parts or countries, in aid therefore of the executors or next of kin, and creditors of the persons so dying not within the said limits, we further, for us, our heirs and successors, grant and ordain, that the said Supreme Court of Judicature at Bombay shall and may grant such probates of wills and letters of administration of any person dying out of the limits of the said jurisdiction, and

leaving effects within the said limits, as the said Court is authorized to grant in case of a person dying within the said limits, so far as may relate to such money or effects as the person so dying was possessed of or entitled to at the time of his decease, within the limits of their said jurisdiction, and no further.

The Court to be a Court of Admiralty.

LIII. And it is our further will and pleasure, and we do hereby grant, ordain, establish, and appoint, that the said Supreme Court of Judicature at Bombay shall be a Court of Admiralty, in and for the said town and island of Bombay, and the limits thereof, and the factories subordinate thereto, and all the territories which now are, or hereafter may be subject to, or dependent upon, the said Government. And we do hereby commit and grant to the said Supreme Court of Judicature at Bombay full power and authority to take cognizance of, hear, examine, try, and determine all causes, civil and maritime, and all pleas of contracts, debts, exchanges, policies of assurance, accounts, charter-parties, agreements, loading of ships, and all matters and contracts which, in any manner whatsoever, relate to freight, or money due for ships hired and let out, transport money, maritime usury, bottomry or respondentia, or to extortions, trespasses, injuries, complaints, demands, and matters, civil and maritime, whatsoever, between merchants, owners, and proprietors of ships and vessels, employed or used within the jurisdiction aforesaid, or between others, contracted, done, had, or commenced, in, upon, or by the high seas or public rivers, or ports, creeks, harbours, and places overflown, within the ebbing and flowing of the sea and high-water mark, within, about, and throughout the town, island, and territories aforesaid, the cognizance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in that part of Great Britain called England, together with all and singular their incidents, emergents, and dependencies, annexed and connexed causes whatsoever; and to proceed summarily therein, with all possible despatch, according to the course of our Admiralty of that part of Great Britain called England, without the strict formalities of law, considering only the truth of the fact and the equity of the case.

Further power with regard to crimes maritime.

LIV. And we do further commit to the said Supreme Court of Judicature at Bombay full power and authority

to inquire, hear, try, examine, and determine, by the oaths of honest and lawful men, being persons so heretofore described as British subjects, and not otherwise,[1] all treasons, murders, piracies, robberies, felonies, maimings, forestalling, extortions, trespasses, misdemeanours, offences, excesses, and enormities, and maritime crimes whatsoever, according to the laws and customs of the Admiralty, in that part of Great Britain called England, done, perpetrated, or committed upon the high seas; and to fine, imprison, correct, punish, chastise, and reform parties guilty, and all violators of the law, usurpers, delinquents, contumacious absentees, masters of ships, rowers, fishers, shipwrights, and other workmen exercising any kind of maritime affairs, according to the said civil and maritime laws, ordinances, and customs, and their respective demerits; and to deliver and discharge persons imprisoned in that behalf, who ought to be delivered, and to take recognizances, obligations, stipulations, and cautions as well to our use as at the instance of other parties, and to put the same, in execution, or to cause or command them to be executed; and also to arrest, or cause or command to be arrested, according to the civil law, and the ancient customs of our High Court of Admiralty, in that part of Great Britain called England, all ships, persons, things, goods, wares, and merchandizes, for the premises, and every of them, and for other causes whatsoever concerning the same wheresoever they shall be met with or found, in or throughout the said districts and jurisdictions aforesaid; and to compel all manner of persons in that behalf, as the case shall require, to appear and answer in the said Court, with power of using any temporal coercion, and inflicting mulcts and penalties, according to the laws and customs aforesaid; and moreover to compel witnesses, in case they shall withdraw themselves for interest, fear, favour, or ill-will, or other cause whatsoever, to give evidence to the truth, in all and every cause or causes above-mentioned, according to the exigencies of the law, and to proceed in such cause

To punish offenders;

Deliver and discharge;

May arrest ships,

To compel persons to appear under penalties: witnesses to answer;

According to the law, civil and maritime, as now is used in Great Britain.

See the Jury Act, 7th Geo. IV. c. 37. and see 2d & 3d Will. IV. c. 117.

or causes, according to the civil and maritime laws and customs, as well at the instance or promotion of parties as of office, mere or mixed, as the case may require; and to promulge and interpose all manner of sentences and decrees, and to put the same in execution, according to the course and order of the Admiralty, as the same is now used in that part of Great Britain called England. Provided always, that the several powers and authorities herein given to the said Court to proceed in maritime causes, and according to the laws of the Admiralty, as herein expressed, shall extend, and be construed to extend, only to such persons as, pursuant to the provisions hereinbefore contained, are and would be amenable to the said Supreme Court of Judicature at Bombay in its ordinary jurisdiction.

Affidavits and affirmations how to be taken.

LV. And we do hereby ordain and appoint, that all affidavits taken in the said Court of Judicature at Bombay, or before any Judge thereof, shall be made on oaths, administered in such form and manner as is before directed in the case of witnesses to be examined before the said Court. Provided nevertheless, that in all civil cases the affirmation in writing of a Quaker, which the said Court, or any Judge of the said Court as the case may require, are hereby authorized and empowered to take, shall be of the same weight, authority, and effect, as an affidavit upon oath. [1]

Power for the Court to appoint Commissioners to take affidavits, &c.

LVI. And we do hereby further will, ordain, and declare, that it shall and may be lawful to and for the said Supreme Court of Judicature at Bombay, in any part of its jurisdiction, whether common law, equity, ecclesiastical, or admiralty, by commission or commissions under the seal of the said Court, to authorize and appoint any fit or proper person or persons, either generally or in any particular case, or for one or more turn or turns only, to receive the acknowledgments of recognizances of bail and bail-pieces, and to administer oaths for the justification of bail, and for the taking of any affidavit or affirmation, or for receiving and taking the answer, plea, demurrer, disclaimer, or examination of any party or parties to any suit, or for the examination of any witness or witnesses upon interrogatories, either *de bene esse* or

[1] See Act V. of 1840.

in chief, or any other occasion, and for the swearing executors and administrators in any suit, matter, or proceeding, which may be pending or about to be instituted in the said Court, upon such occasions as the said Court shall think fit to issue such commissions. And we direct and ordain, that such commission and commissions, so to be issued, shall respectively be executed, acted under, and returned, if the same shall require any return, in such manner and form as such matters are usually transacted by commissions, general or special, issued out of our Court of King's Bench at Westminster, or our High Court of Chancery, or the Ecclesiastical Court of the Diocese of London, or our High Court of Admiralty in England, respectively. Provided always, that nothing therein contained shall extend to authorize or empower the issuing of any commission or commissions for the examination of any witness or witnesses, upon any indictment or information, for any offence whatsoever, to be tried and determined by and before the said Court.

Suitor's money and securities to be deposited with the Company's cash.

LVII. And we do further will and ordain, that all the monies, securities, and effects of the suitors of the said Court, which shall be ordered into Court, or to be paid, delivered, or deposited for safe custody, shall be paid or delivered unto, or deposited with, the Governor, or President and Council at Bombay, to be by them kept and deposited with the cash and effects of the said Company, subject to such orders and directions as the said Supreme Court of Judicature at Bombay shall, from time to time, think fit to make concerning the same, for the benefit of the suitors, the said United Company being responsible for the said monies, securities, and effects, in such manner, and subject to the same exceptions, as is mentioned in the said in part recited Charter of His said Majesty, King George the Second, with respect to the monies, securities, or effects to be deposited with the said Governor or President and Council, under the authority of the Mayor's Court thereby erected.

An Accountant-General to be appointed by the Court of Directors

LVIII. And we do, for us, our heirs and successors, give and grant unto the Court of Directors of the said Company, or the major part of them, full power and authority, from time to time, to name and appoint an officer, under the name of the Accountant-General of the

Supreme Court of Judicature at Bombay, and the same, at their pleasure, to remove, and another to appoint, who shall act, perform, and do, all matters and things necessary to carry into execution the orders of the said Court, relating to the payment or delivery of the suitors' money, effects, and securities, unto the Governor or President and Council of Bombay, and taking the same out again, and keeping the accounts with the said Governor and Council and Register of the Supreme Court of Judicature at Bombay, and other matters relating thereto, under such rules, methods, and directions, as shall from time to time be made and given, under the hands of thirteen or more of the Court of Directors of the said Company; which rules, methods, and directions, we will and direct shall be according to such rules, methods, and directions as are observed by the Accountant-General of our High Court of Chancery in Great Britain, or as near thereto as may be, and as the situation and circumstances of affairs will permit.

Court of Request and Quarter Sessions, &c. to be subject to this Court.

LIX. And to the end that the Court of Request and the Court of Quarter Sessions, erected and established at Bombay aforesaid, and the Justices and other Magistrates appointed for the town and island of Bombay, and the factories subordinate thereto, may better answer the ends of their respective institutions, and act conformably to law and justice, it is our further will and pleasure, and we do hereby further grant, ordain, and establish, that all and every the said Courts and Magistrates shall be subject to the order and controul of the said Supreme Court of Judicature at Bombay, in such sort, manner, and form, as the inferior Courts and Magistrates of and in that part of Great Britain called England are by law subject to the order and controul of our Court of King's Bench; to which end, the said Supreme Court of Judicature at Bombay is hereby empowered and authorized to award and issue a writ or writs of *mandamus, certiorari, procedendo,* or error, to be prepared, in manner above-mentioned, and directed to such Courts or Magistrates as the case may require, and to punish any contempt thereof, or wilful disobedience thereunto, by fine and imprisonment.

Appeal to the King in Council.

LX. And it is our further will and pleasure, and we do hereby direct, establish, and ordain, that if any person or persons shall find him, her, or themselves aggrieved,

by any judgment or determination of the said Supreme Court of Judicature at Bombay, in any case whatsoever, it shall and may be lawful for him, her, or them, to appeal to us,[1] our heirs or successors, in our or their Privy Council, in such manner, and under such restrictions and qualifications as are hereinafter mentioned, that is to say, in all judgments or determinations made by the said Supreme Court of Judicature at Bombay in any civil cause, the party and parties against whom, or to whose immediate prejudice the said judgment or determination shall be or tend, may, by his or their humble petition, to be preferred for that purpose to the said Court, pray leave to appeal to us, our heirs or successors, in our or their Privy Council, stating in such petition the cause or causes of appeal; and in case such leave to appeal shall be prayed by the party or parties who is or are directed to pay any sum of money, or to perform any duty, the said Court shall and is hereby empowered to award, that such determination or judgment shall be carried into execution, or that sufficient security shall be given for the performance of the said judgment or determination, as shall be most expedient to real and substantial justice. Provided always, that where the said Court shall think fit to order the judgment or determination to be executed, security shall be taken from the other party or parties for the due performance of such judgment or order, as we, our heirs or successors, shall think fit to make thereupon. And in all cases, we will and require, that security shall also be given, to the satisfaction of the said Court, for the payment of all such costs as the said Supreme Court of Judicature at Bombay may think likely to be incurred by the said appeal, and also for the performance of such judgment or order as we, our heirs or successors, shall think fit to give or make thereupon. And upon such order or orders of the said Court, thereupon made, being performed to their satisfaction, the said Court shall allow the appeal, and the party or parties, so thinking him, her, or themselves aggrieved, shall be at liberty to prefer and prosecute his, her, or their appeal, to us, our heirs or successors, in our or their Privy Council, in

Security on such appeal for costs, and for performance of judgment.

[1] For the law regulating appeals to the Sovereign in Council, see 6th & 7th Vict c. 38 7th & 8th Vict. c. 69.

such manner and form, and under such rules, as are observed in appeals made to us from our plantations or colonies, or from our Islands of Guernsey, Jersey, Sarke, or Alderney.

Court, on such appeal, to transmit a copy of all evidence and proceedings.

LXI. And it is our further will and pleasure, and we do hereby direct and ordain, that in all such cases the said Supreme Court of Judicature at Bombay shall certify and transmit, under the seal of the said Court, to us, our heirs or successors, in our or their Privy Council, a true and exact copy of all evidence, proceedings, judgments, decrees, and orders, had or made in such causes appealed, so far as the same have relation to the matter of appeal.

In criminal suits, the Court may allow or deny appeal, and regulate the terms.

LXII. And it is our further will and pleasure, that in all indictments, informations, and criminal suits and causes whatsoever, the said Supreme Court of Judicature at Bombay shall have the full and absolute power and authority to allow or deny the appeal of the party pretending to be aggrieved, and also to award, order, and regulate the terms upon which appeals shall be allowed, in such cases in which the said Court may think fit to allow such appeal.

Reservation of power to the King to refuse an appeal.

LXIII. And we do hereby also reserve to ourself, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a judgment or determination of the Supreme Court of Judicature at Bombay, to refuse or admit his, her, or their appeal thereupon, upon such terms, and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, correct, or vary such judgment or determination, as to us or them shall seem meet.

Court to execute judgments and orders of His Majesty.

LXIV. And we do further direct and ordain, that the said Court shall, in all such cases, conform to and execute, or cause to be executed, such judgments and orders as we shall think fit to make in the premises, in such manner as any original judgment, decree, or decretal, or other order or rule by the said Supreme Court of Judicature at Bombay should or might have been executed.

No Appeals to be allowed, except the petition shall be preferred within six months, and unless the matter shall exceed 3000 Bombay Rupees in value.

LXV. Provided always, that no appeal shall be allowed by the said Court, unless the petition for that purpose shall be preferred within six months from the day of pronouncing the judgment or determination complained of, and unless the value of the matter in dispute shall exceed the sum of three thousand Bombay Rupees.[1]

Chief Justice and other Judges to be sworn.

LXVI. And it is our further will and pleasure, and we do hereby direct, ordain, and appoint, that the said Chief Justice, and other Justices, forthwith, after the arrival of this our Charter at Bombay, if he or they shall then be there, or forthwith after his or their arrival there, shall assemble themselves, or so many of them as shall be able to assemble themselves, in the room or hall where the Court of the Recorder of Bombay shall then be usually holden, or in some other proper room or place to be appointed for that purpose; and the said Chief Justice, if present, shall then and there take an oath, in the most solemn manner, that he will, to the best of his knowledge, skill, and judgment, duly and justly execute the said office of Chief Justice of the Supreme Court of Judicature at Bombay, and impartially administer justice in every cause, matter, or thing which shall come before him; and shall also take the oath of allegiance and supremacy, and make and subscribe the declaration against transubstantiation, in such manner and form as the same are by law appointed to be taken or made in Great Britain, of which oaths a record shall be forthwith made. And we do hereby authorize the said Puisne Justices, or such of them as shall then be present, to administer the said oaths and declarations, and make such record thereof accordingly; and the said Puisne Justices, or such of them as shall then and there be present, shall take the like oaths, and make and subscribe the like declarations, only changing what ought to be changed for that purpose, before the said Chief Justice, if present, and if not, then each of the said Puisne Justices shall take such oath before the other of them, of which oaths also a record shall be forthwith made. And we do hereby authorize the said Chief Justice and Puisne

[1] But see 3d and 4th Will. IV. c. 41.; and the Order in Council dated the 10th April 1838.

Justices, respectively, to administer the said oaths and declarations, and record the same accordingly. And we do hereby further ordain and establish, that the said Chief Justice and Puisne Justices, and all and every succeeding Chief Justice and Puisne Justices, shall, before he or they shall be capable of exercising the said office or offices, respectively take, in open Court, the like oaths, and subscribe the like declarations, only changing what ought to be changed for that purpose, whereof records shall be made and filed among the other records of the Court from time to time; and after the said Chief Justice and the said Puisne Justices, or so many of them as shall be assembled at the time and place aforesaid, shall have taken the said oaths, and have made and subscribed the like declaration, the said Supreme Court of Judicature at Bombay shall be proclaimed and published in due manner, and proceed forthwith to the execution of the several authorities hereby vested in it.

After publishing of this Charter, the Recorder's Court to cease,

LXVII. And it is our further will and pleasure, and we hereby grant and declare, that from and immediately after the publishing and proclaiming of the said Supreme Court of Judicature at Bombay, so much of the said Charter granted by his said Majesty, King George the Third, in the thirty-eighth year of his reign, as hereinbefore mentioned, as confers any jurisdiction whatsoever, civil or criminal, or ecclesiastical, upon the Court of the Recorder of Bombay, shall cease and determine, and be absolutely void, to all intents and purposes; and all powers and authorities by any Act or Acts of Parliament granted to, or vested in the said Court of the Recorder of Bombay, shall cease and determine, and be no longer exercised by the said Court; but the same shall and may be exercised by the said Supreme Court of Judicature at Bombay, in manner and to the extent herein directed.

And its authority over all matters depending is given and transferred to the new Court,

LXVIII. Provided always, that no judgment or decree or decretal, or other order, rule, or act of the said Court of the Recorder of Bombay, legally pronounced, given, had, or done, in any of the jurisdictions, civil, criminal, or ecclesiastical, given to the said Court of the Recorder of Bombay before such publication and proclamation, as aforesaid, of the said new Court hereby established, shall be

hereby avoided, but shall remain in full force and virtue, as if these presents had not been made; nor shall any indictment, information, action, suit, cause, or proceeding, depending in the said Court of the Recorder of Bombay, whether originally instituted in such Court in any branch of its jurisdiction, or transferred from any other Court or Courts of Judicature, be abated, discontinued, or annulled, but the same shall be transferred, in their then present condition respectively, to, and subsist and depend in, the said Court hereby established, according to the several jurisdictions hereby given to such Court, severally and respectively, to all intents and purposes, as if they had been respectively commenced, brought, found, presented, or recorded in the said Court hereby established. And we do hereby authorize and empower the said Court hereby established, to proceed accordingly in all such indictments, informations, actions, suits, causes, and proceedings, to judgment and execution, and to make such rules and orders respecting the same, and also respecting any sum or sums of money belonging to the suitors of the said Court of the Recorder of Bombay, or of any of the Courts, the jurisdiction whereof was transferred to the said Court of the Recorder of Bombay, as the said Court of the Recorder of Bombay might have made, or as the said Court hereby established is hereby empowered to make, in causes, suits, or proceedings commenced or depending before the said Court hereby established: for which purpose it is our further will and pleasure, that all the records, muniments, and proceedings whatever, of or belonging to the said Court of the Recorder of Bombay, or which ought to be deposited with such Court, shall be delivered and deposited, and preserved amongst the records of the said Supreme Court of Judicature at Bombay, hereby established.

And all the records of the Recorder's Court are to be preserved by the new Court.

Court to settle proper terms, &c.

LXIX. And it is our further will and pleasure, and we do hereby authorize and empower the said Supreme Court of Judicature at Bombay (respect being had to the seasons of the year, and the convenience of the suitors) to settle and appoint proper terms and law days, and days for sittings after term if necessary, and to change and vary such appointments as occasion shall require, and to proclaim, hold, and adjourn the Sessions of Oyer and

Terminer, and Gaol Delivery, and Admiralty Sessions, as to them severally shall seem most expedient.

The Oyer and Terminer shall be held four times a year.

LXX. Provided nevertheless, that the said Court shall and is hereby required, in each year, to hold at the least four Sessions of Oyer and Terminer, and Gaol Delivery, within and for its limits, and more, if the same shall be found necessary for the convenience of the said settlement of Bombay, and the ends of public justice.

Rules to be transmitted to the President of the Board of Commissioners for the affairs of India.

LXXI. Provided also, and it is our further will and pleasure, and we do hereby require and enjoin the said Court, as soon as any rules shall have been made for the appointment of terms or law days, or for the variation of such appointment, by the first convenient opportunity after making or varying the samo, to transmit a copy thereof, under the hands and seals of the Judges of the said Court, to the President of the Board of Commissioners for the affairs of India, to be laid before us, our heirs or successors, for our and their royal approbation and correction. And we ordain and direct, that such appointments shall be kept and observed, until the same shall be altered by us, our heirs or successors, and then with such variation or alteration as we, our heirs or successors, shall cause to be made therein. Provided also, and we do hereby further will and ordain, that after the said terms and law days shall once have been fixed by the said Court, no variation to be made therein by the said Court shall take effect, until such variation shall have been approved and confirmed by us, our heirs or successors.

Power to sequester goods of persons exempted from arrest.

LXXII. Provided always, and we do hereby direct and declare, that in all cases in which the person or persons of the Governor-General of Fort William, the Governor or President of Fort St. George, or the Governor or President of Bombay, or any of the Counsellors of the Presidency of Bombay, or the Chief Justice, or any of the Puisne Justices of the said Supreme Court of Judicature of Bombay, is, and are hereby declared not to be subject or liable to be arrested or imprisoned, as aforesaid; and wherein a *capias* or process for arresting the body is hereby given and provided against other persons, it shall and may be

lawful for the said Courts hereby established, respectively, to order the goods and estates of such persons, so exempted from arrest and imprisonment, as aforesaid, to be seized and sequestered, or sold, if need be, until he or they respectively shall appear and yield obedience to the judgment, decree, or decretal, or other order or rule of the said Court.

Proviso as to trial of offences by the Judges.

LXXIII. Provided always, and we do hereby direct and declare, that all offences committed by, or charged upon the said Chief Justice, or any of the Puisne Justices of the said Supreme Court of Judicature at Bombay, respectively, shall be heard, tried, and determined, in the same manner as if the same were committed by, or charged upon, any of the Judges of the Supreme Court of Judicature at Fort William in Bengal.

General clause, as to powers of the new Court to try all causes which may now be tried at Bombay.

LXXIV. And it is our further will and pleasure, and we do hereby grant and declare, that the said Supreme Court of Judicature at Bombay shall have full power and authority to hear, try, and determine, all and all manner of suits and actions, either civil or criminal, which by the authority of any Act or Acts of Parliament, or under the authority of the said letters patent of the thirty-eighth year of his said Majesty, King George the Third, may now be tried or determined by the said Court of the Recorder of Bombay, and that all powers, authorities, and jurisdictions, of what kind or nature soever, which by any Act or Acts of Parliament, or by the said letters patent, may be or are directed to be exercised by the said Court of the Recorder of Bombay, shall and may be as fully and effectually exercised by the said Supreme Court of Judicature at Bombay, as the same might have been exercised and enjoyed by the said Court of the Recorder of Bombay.

Grants of fines to the East-India Company.

LXXV. And furthermore, we, of our further especial grace, certain knowledge, and mere motion, have given and granted, and by these presents, for us, our heirs and successors, do give, grant, and confirm unto the said United Company of Merchants of England trading to the East Indies, and their successors, all such fines, amerciaments, forfeitures, penalties, or parts of penalties, and sums of money whatsoever, as have heretofore

been ordered, charged, judged, set, imposed, or awarded, upon or against any person or persons whomsoever, in or by any Court of Justice or person at Bombay, having lawful authority to order, charge, adjudge, set, impose, or award the same, and all such fines, amerciaments, forfeitures, penalties or parts of penalties, and sums of money, which hereafter, during all the residue of the term of the continuance of the said United Company's Government, shall be ordered, judged, set, imposed, or awarded upon or against any person or persons whomsoever, in or by the said Court hereby established, or by any Court of Oyer and Terminer, and Gaol Delivery, or General Court of Quarter Sessions, or by any of the Justices of the Peace, Commissioners of Oyer and Terminer, or Gaol Delivery, for the said Presidency of Bombay, or any of them, or by any person or persons there having lawful authority to order, charge, adjudge, set, impose, or award the same, for or by reason of any offences, misdemeanours, defaults, contempts, neglects, or forfeitures whatsoever, to have, hold, receive, levy, sue for, recover, and enjoy the same, to the said United Company, in as large and ample manner, to all intents and purposes, as we, our heirs or successors, could or might have had, held, received, levied, sued for, recovered, and enjoyed the same, if these presents had not been made, without any account or other matter or thing to be rendered or paid for the same, unto us, our heirs or successors; subject nevertheless to the several powers and authorities by these our letters granted to, or vested in the said Court hereby established, to discharge, mitigate, or set over any of such fines, amerciaments, forfeitures, penalties, or sums of money respectively, according to the true intent and meaning hereof.

Power for the Court to make satisfaction to prosecutors out of fines.

LXXVI. Provided always, nevertheless, that it shall and may be lawful, and we hereby authorize and empower the said Supreme Court of Judicature at Bombay to make such satisfaction to prosecutors of information or indictments, as to the said Court shall seem reasonable and fit, out of any fine or fines to be set or imposed upon any person or persons, who shall be convicted upon such proceedings, respectively, and to order and direct such satisfaction to be paid accordingly, as hereinafter directed.

Power given to the East-India Company to recover the fines.

LXXVII. And we do hereby, for us, our heirs and successors, give and grant unto the said Company full power and authority to sue for, recover, and levy, all and every the said fines, amerciaments, forfeitures, penalties, and sums of money, by any action or actions of debt to be brought in the said Court hereby established, or by such other suits, actions, ways, means, and proceedings, as may be lawfully had and prosecuted in the said Court, in their corporate name, or by any other lawful ways or means, either in the name of us, our heirs or successors, or of the said United Company of Merchants of England trading to the East Indies, and to collect, take, seize, and levy the said fine, amerciaments, forfeitures, penalties, and sums of money, in and by these presents granted, or mentioned to be granted, from time to time, by the proper officers and ministers of the said United Company of Merchants of England trading to the East Indies, to the only proper use and behoof of the said Company, without any writ, warrant, or other process of the exchequer of us, our heirs and successors, or any other Court or Courts whatsoever and wheresoever, to be had and obtained in that behalf, any usage or custom to the contrary thereof in any wise notwithstanding; subject nevertheless to such orders as the said Court hereby established shall respectively make, in favour of prosecutors, as hereinbefore directed.

Court to cause payment of fines to the Company.

LXXVIII. And we do hereby, for us, our heirs and successors, direct, authorize, and command the Chief Justice, and other Justices of the said Court hereby established at Bombay, and all Justices of the Peace, Commissioners of Oyer and Terminer, and Gaol Delivery, now and for the time being, all sheriffs and other officers and ministers, and others therein concerned respectively, by virtue of these our letters patent, to cause to be paid over to the said United Company of Merchants of England trading to the East Indies, from time to time, all such fines, amerciaments, forfeitures, penalties, and sums of money, as shall be set or imposed upon, or be forfeited or accrued due, by or from any person or persons, as aforesaid; and the same shall be paid or satisfied by such person or persons accordingly, or otherwise shall and may be recovered and levied, by any of the ways and means before mentioned, subject

nevertheless to such orders as shall be made for the satisfaction of prosecutors, as hereinbefore directed. And we do, by these presents, for us, our heirs and successors, declare and grant, that such payments, so to be made, shall be as full and sufficient a discharge, to all intents and purposes, to the said Chief Justice and other Justices of the said Supreme Court of Judicature at Bombay, Justices of the Peace, Commissioners of Oyer and Terminer, and Gaol Delivery, and the said respective officers and ministers, and all and every other person and persons, as if such payments had been made to us, our heirs and successors, at the receipt of our or their exchequer.

Provision for recovery of fines.

LXXIX. And to the intent that the ends of justice may not be frustrated or delayed by the want of a due remedy to enforce the payment of the said fines, amerciaments, forfeitures, penalties, and sums of money, we hereby will and direct, that the Commissioners of the said Court of Oyer and Terminer, and Gaol Delivery, and the Justices of the Peace, in their Courts of Quarter Sessions, shall by themselves, or by the proper officers of the said Court, in every term next after the holding of the said Courts respectively, deliver unto the said Court hereby established, upon oath, an estreat roll of all fines, amerciaments, forfeitures, penalties, and sums of money, which shall have been set, imposed, lost, or forfeited, by any person or persons whatsoever, at or by, or before the said Courts, or any of them, or by or before any of the said Commissioners or Justices of the Peace, during the time of the holding any of the said Courts of Oyer and Terminer, and Gaol Delivery, or Quarter Sessions, at any period subsequent to the time when the next preceding Courts, aforesaid, were last holden, respectively; and that it shall and may be lawful for the said Court hereby established, to award and issue such process against the persons liable to the payment thereof, in order to the recovery of the same, in aid and for the use of the said Company; or otherwise, according to the circumstances of the case, to discharge or mitigate the same, as our Court of Exchequer in England, or the Chancellor and Barons thereof, may or can lawfully do, upon estreats of the green wax in England; with power also to the said Court hereby established, by any rule or order, to cause a share or proportion of any fine, imposed on any person or persons, for any delinquency or misdemea-

nour prosecuted to judgment, to be paid over to the prosecutor, towards defraying his expenses occasioned thereby, as such Court shall, in its discretion, think fit or expedient.

All the King's subjects to be aiding and assisting.

LXXX. And we do further hereby strictly charge and command all Governors and Commanders, Magistrates, and Ministers, civil and military, and all other our faithful and liege subjects whomsoever, in and throughout the British territories and possessions in the East Indies, and the countries, territories, districts, and places, which now are or shall be hereafter dependent thereon, or subject or subordinate to the British Government there, that in the execution of the several powers, jurisdictions, and authorities hereby granted, made, given, or created, they be aiding, assisting, and obedient in all things, as they will answer the contrary to their peril.

Dated the 8th December, fourth year of the reign.

In witness whereof we have caused these our letters to be made patent. Witness ourself, at Westminster, the eighth day of December, in the fourth year of our reign.

By writ of Privy Seal,

BATHURST.

I.

SIR EDWARD HYDE EAST'S

NOTES

OF

DECIDED CASES.

ERRATA.

Page 24, line 15, *for* subpœned *read* subpœnaed.
Page 39, line 15, *for* 247 *read* 58.
Page 41, line 28, *for* Dough. *read* Dougl.
Page 73, last line but one, insert "*durante minoritate,*" between the words "administration" and "of."
Page 95, line 17, *for* 2 Wils. *read* 2 Wils. 6.
Page 96, line 15, *for* 258 *read* 298.
Page 147, line 8, *for* testatator *read* testator.
Page 266, last line, *for* "in the following case," *read* "in Case IX., Dhackjee Dadajee *v.* the East-India Company, *infra* p. 307."
Page 317, last line, *for* conversion *read* contraversion.
Page 547, first line, *for* III. *read* IV.

END OF THE SECOND VOLUME.

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